THE MADRAS LAW JOURNAL

MUSINGS ON 1977

by

PROF. S. VENKATARAMAN.

The year 1977, by and large, has been an eventful year both at home and abroad. The Congress Party which was in power at the Centre for an unbroken period of almost thirty years met its Waterloo in the battle of the ballot at the hands of the Janata Party which emerged on the eve of the elections and a ministry formed by that party at the Centre has been functioning for about nine months now. The Janata Party has acquired a political identity, but it is yet to achieve an integrated personality of its own based on a synthesis of shared ideals or common purposes other than merely holding together to run the Government so as to ensure for it effective credibility. Naturally every new Government is expected to redeem the election pledges and promises on the basis of which it was voted to power so as to avoid being said of it:

"The only difference after all the rout,
Is that the one is in, the other out."

The Janata Party contains eminent legal luminaries like Sri K. S. Hegde (retired Judge of the Supreme Court and currently Speaker, Lokh Sabha), Sri N. A. Palkhivala (currently Ambassador to the United States of America), Sri Shanti Bhushan (currently Minister for Law) and others. Sri Shanti Bhushan is one of the top class lawyers in the country and the legal profession, in particular, pins great hopes on him to undo and remedy undesirable exercise of executive power manifested in some directions during the period of emergency. There is the story of a former British Prime Minister remarking about a young political aspirant: "I thought he was a man of promise; but I soon discovered that he was only a man of promises". It is to be hoped that the Minister for Law will, by his acts show that he is made of sterner stuff and is totally dedicated to his work.

The Greek historian Diodorus Seculus recorded that in ancient India an adviser to the State was permitted three errors before he was banished from public life and that in the city states of Greece politicians proposed new laws with a noose round their necks and if a law failed to get approval they were hanged. But even such desperate recipes could not ensure good Governments or good laws. It only means that public opinion has to be alert and vigilant all the time.

The outgoing Government itself lifted the emergency before it went out of office. Civil liberties were restored in its wake and the present Government is striving to give meaning and direction to it. This is but just and proper. As Winston Churchill once observed, "the distinction between civilisation and tyranny could be summed up in two words —*habeas corpus*".

Domestic front: the Judiciary.—In a federal democracy certain things are fundamental: (*i*) The Constitution is supreme; (*ii*) No one is above the law; (*iii*) Independence of the judiciary is to be cherished and sustained. Naturally the legal profession felt disturbed and reacted sharply to the previous Government's gambit to have a judiciary made to measure. There were occasional snipings at the Supreme Court in the early days of independence. A dignified rejoinder was made by Patanjali Sastri, CJ., in

V. G. Row's case[1], where he observed: "If the Courts in India discharged their difficult task, it was not out of a desire to tilt at Legislatures in a crusader's spirit but in discharge of their plain duty under the Constitution. This was particularly true of fundamental rights of which the Supreme Court had been constituted a sentinel on the *qui vive*". When *Golaknath's case*[2], was decided, some politicians described the majority judgment as a 'confrontation' between the Supreme Court and Parliament for supremacy and some time later the theory of "committed Judges" was propounded. The final irritant was the majority judgment in the case of *Kesavananda Bharati* v. *State of Kerala*[3], holding that Parliament had no power to amend the basic features of the Constitution. This led to the passing of the Constitution (Forty-second) Amendment prescribing a special bench of seven Judges of the Supreme Court to decide cases involving questions of the constitutionality of any central enactment and a special majority of the Bench to declare such law as invalid. Talk of a 'confrontation' between the Supreme Court and Parliament is mischievous. Denigration of the Judiciary can do no good. For a spirited and closely reasoned reply defending the Judiciary and its attitude in *Kesavananda Bharati's case*[3], one may peruse with profit Sri Jaganmohan Reddy's booklet on Social Justice and the Constitution. Lord Denning M. R., finds that the Supreme Court deserves praise for its upholding the rule of law in critical times[4].

In a democratic order none can be above the law. While it is desirable to inject justice into politics, it is disastrous to inject politics into justice. The recent judgment of the Court of Appeal in England rejecting the claim made by the Attorney-General, Silkin Q. C., that he is only responsible to Parliament and is not bound by the law is at once a warning and lesson of utmost import to all persons interested in the rule of law. Lord Denning, M. R., made the trenchant observation "Be you ever so high, the law is above you". An unpleasant manifestation of executive power during the emergency period was in relation to the transfer of quite a number of Judges from one High Court to another for allegedly political reasons. It even led to the filing of a writ petition challenging the constitutional validity of such transfers. The Supreme Court has now ruled that the consent of the concerned Judge is not necessary to his transfer in terms of the Constitution and is taken only as a matter of courtesy having regard to the high position of the Judge and that a Judge could be transferred even against his wishes in the public interest such as administrative exigencies, factious local atmosphere or a Judge having a circle of favourites and non-favourites. At the same time, the Supreme Court has suggested that to avoid charges of misuse of power the Chief Justice of India should be consulted substantially and effectively, his advice should not be treated cavalierly, and disregard of his opinion may well point to extraneous considerations at work. Transfer of Judge for honourable reasons and with his consent would be unexceptionable but a transfer for ulterior reasons or from questionable motivation will be bitterly resented. Transfer of High Court Judges has been considered desirable by the States Reorganisation Commission for promoting national integration and the Law Commission has favoured the proposal. Right now when English continues to be in use in the High Courts language would not be a serious problem. Even later a knowledge of English and Hindi, as envisaged by the three language formula should stand a Judge in good stead anywhere in the country.

Law's delays and arrears in Courts.—Litigation is an activity that does not markedly contribute to the happiness of mankind, though it is sometimes unavoidable. Once initiated it drags on like a turtle. The Court is not a computer registering what is fed into it and answering by mechanical intelligence. The Court administers justice according

1. 1952 S.C.R. 547, 605, 606.
2. (1967) 2 S.C.R. 762.
3. A.I.R. 1973 S.C. 1461.
4. See the Supreme Court of India by Rajeev Dhavan, Foreword by Lord Denning.

to law and it endeavours to get at the truth with impartial tools, objectively and unbiased. It is a sad fact that over the years institution of cases and disposals have not kept pace. A huge backlog of arrears exists in the several High Courts as well as in the Supreme Court. It is admitted that justice delayed may often be justice denied. It is equally recognised that speedy justice should not be hustled justice. It is also eminently desirable that the gap between the date on which a case is first filed in a Court and its final disposal by the highest Court in appeal should not exceed twelve months. All these sound like copy book norms. The real question is one of the adequacy of whatever has been done hitherto to control law's delays and clear the backlog or whether there has been only a polishing of the brass when the ship is collapsing. Various contributory factors, all of them familiar, for law's delay and accumulation of arrears have been listed, such as population growth, greater awareness of his rights by the average citizen, phenomenal increase in trade and commerce, inadequacy of Judges, unsatisfactory recruitment, failure to fill up vacancies as and when they arise, slow disposals, multiplicity of judgments in Supreme Court appeals not all of them being reconcilable, citation of too many authorities, lengthy argument by counsel, cumbrous and technical laws of procedure, defective drafting of legislation etc. In a similar way various remedial measures have been put forth to meet the problem of law's delay and arrears in Courts, such as appointment of more Judges, provision for sitting of High Court Benches at mofussil stations, empowering single Judges to dispose of cases now requiring a bench of two Judges for the purpose, appointment of *ad hoc* Judges to clear arrears, dispensing with the requirement of printed copies of judgments for purpose of appeal and allowing in their place typed copies, to be given by the Court to the parties as carbon copies of the original judgment even while preparing the fair copy of the judgment, replacing chief examination of witnesses by affidavit evidence subject to the availability of the deponents for cross-examination when desired, avoiding cursory disposal of cases, for instance by dismissing a suit or appeal for default of appearance of parties by curbing as far as possible *ex parte* disposal of cases so that addition to litigation through restoration petitions may be minimised, imposition of time-limit on arguments, submission of written arguments, replacement of the system of payment to lawyers on the basis of day fees by a system of consolidated fees for the whole case, enlargement of the scope of section 250, Civil Procedure Code and imposing penalty with liability to pay compensation to the other party by a person deliberately bringing a false, frivolous or vexatious case, Judges in the High Court devoting more time to the hearing of cases and dictating judgments in their homes, imposing a limit of time for disposal of cases and so forth.

It is clear that law's delay is attributable in the ultimate analysis not to any one individual or body like Government, Courts, Lawyers, Legislative draftsmen or Litigants but to all of them in varying degrees. Government which often bemoans law's delays has itself to set a better example in the matter. Government is the largest single litigant. It is therefore pertinent to examine how it acts as a litigant. The lethargy and lack of concern on the part of the executive in discharging its functions in time as a participant in a litigation has come in for strong criticism by Courts. A bench of the Supreme Court in dismissing an appeal from a judgment of the Bombay High Court in a civil case found that "the State as a party has frequently been displaying remissness in filing statements, counter-affidavits or motions for *ex parte* stay or injunction in the lower Courts including the High Court. Thus a considerable contributory to litigative slow motion is Government itself". The Court observed further that in view of the large expense involved in fighting a litigation in the Supreme Court, it was "all the more necessary that the State Governments which have public accountability in respect of their actions, should not lightly rush to this Court to challenge a judgment of the High Court which is plainly and manifestly correct

and drag the opposite party in unnecessary expense part of which could in any event not be compensated by the award of costs".

It is equally pertinent to inquire why vacancies of Judges in the High Court, sometimes more than half a dozen in a single High Court should have remained unfilled for long spells. For instance, in the Mysore High Court with a sanctioned strength of 17 Judges, 14 permament and 3 additional, more than a third of its strength remained vacant from 1974. The same is the story with some of the other High Courts as well. It looks strange that Government which has contributed not a little by its action and inaction to law's delay should deplore the increasing accumulation of arrears in Courts.

How the requirement of benches with a strength of not less than seven Judges in the Supreme Court to decide cases involving the constitutional validity of any legislation affects the working of that Court and adds to arrears is highlighted by recent judgments of that Court. In *Trustees for the Improvement of Calcutta* v. *C. S. Mallick*[5], Bhagwati, J., speaking for the Court observed: "This Court has a dual responsibility to the country. It has to decide the cases brought before it justly and satisfactorily and at the same time, liquidate arrears of pending cases. Both bear upon the credibility of the judicial system. But because of Article 144-A brought in by the Forty-second Amendment Act seven Judges of this Court have to sit and hear every case where the constitutionality of an Act, Rule, Bye-law or even a small notification is challenged. Processual pragmatism in the light of actual experience of the working of this Court will easily convince anyone that, in the context of the current docket explosion and long pendency of cases, the insistence on this inconvenient plurality which requires more than half the full strength of the Court to sit to hear such cases is a step in the wrong direction. Many questions of constitutional importance have already been covered by the rulings of this Court so that he who runs and reads may resolve them. To require seven Judges to perform such jobs is surely supererogatory. The present appeal itself is a striking illustration. Where really important issues arise for consideration, any bench of this Court, would certainly refer, where necessary, such matters for consideration or reconsideration by a larger bench, less or more than seven, according to the requirement of the situation. To prescribe arithmetically is to petrify unimaginatively. We do not say anything about the validity of Article 144-A one way or the other but merely highlight the paralysing impact on the highest Court of justice, flowing from the numerical rigidity newly inserted by the Forty-second Constitution Amendment Act. We hope and trust that this matter will receive urgent attention of parliament".* In a similar vein, in *Misrilal Jain* v. *State of Orissa*[6], Chandrachud, J., speaking for the Court said: "A Court which has large arrears to contend with has now to undertake an unnecessary burden by seven of its members assembling to decide all sorts of constitutional questions no matter what their weight or worth. It is hoped that Article 144-A will engage the prompt attention of the Parliament so that it may, by general consensus, be so amended as to leave to Court itself the duty to decide how large a bench should decide any particular case".*

Apropos of imposing a time-limit for disposal of cases the Committee appointed by the Bar Council of India for suggesting ways and means for expediting disposal of civil and criminal cases and for clearing the arrears in the various Courts has recommended the limits of time within which the judicial proceedings of various classes should normally be brought to a conclusion in the Courts in which they are instituted: (*i*) a regular original suit in a Court of a munsif, or

5. (1977) 2 S.C.J. 315, 320.

*Parliament has now responded by enacting the Forty-fourth Amendment to the Constitution doing away *inter alia* with the impugned provision.

6. (1977) 2 S.C.J. 864: A.I.R. 1977 S.C. 1686.

subordinate judge at a year to 1½ years; (*ii*) contested first appeal 6 months; (*iii*) second appeal in the High Court within one year; (*iv*) civil first appeal in the High Court within 2 years; (*v*) all writ petitions, revisions and criminal appeals within a period of 2 months to 6 months. For clearing arrears the Committee has suggested that a Judge of a High Court should normally decide 650 cases per year and consequently the strength should be raised to bring the number of Judges in proportion to the number of cases filed in the High Court. Further for clearing the arrears the Committee has recommended the appointment of additional and *ad hoc* Judges for a period of two years to clear the said arrears within that time. Presumably the yardstick of 650 cases has reference to contested cases and excludes what have come to be known as disposals for statistical purposes. Again to expect disposals of writ petitions within 2 to 6 months is ambitious. At present they seem to take more than 2 years.

One is apt to overlook the fact that backlog of cases in the appellate Courts would be appreciably reduced in course of time, if resort by litigants to the Courts at the lower levels for everything is checked and controlled. If people can be persuaded to get disputes settled by arbitration that would greatly help. *Apropos* of this it is interesting to note that in the United States, to make justice faster, fairer and more accessible to the people, in regard to certain types of disputes such as neighbourhood, family, housing and consumer problems which cost too much and take too long to go to Court, the Carter administration has suggested as a means of relieving the overloaded Courts the starting of "neighbourhood justice centres" and provided funds for the purpose. There will be no Judge or jury. Instead the emphasis will be on mediation and the Centres will only intervene if both parties agree. It will be worth while to study the working of the institution.

Social Legislation.—Reform of public conscience and normal and social values is the indispensable preface to every statute and its unwritten preamble[7]. In the absence of enlightened social conscience, traditions and usages hold the parties bound. Experience shows that in matters like abolition of the dowry system, abolition of untouchability, abolition of child marriages, etc., statutes alone have not been able to achieve much. Public conscience cannot be created by statute. It wakes up through economic pressures and education. Marriage is very much a social institution and any change therein cannot but fly in the face of some harsh facts relating to the social situation in the country. Neither the provisions of the Child Marriage Restraint Act nor those of the Hindu Marriage Act have made much impact outside the sphere of "educated" classes. There are some facts which are revealing. Last year, it is reported that there was a mass marriage ceremony of 10,000 babies in Marwar. Again the Defence Ministry seems to have been shocked earlier to find that some of the widows of persons killed in the Bangla Desh war in 1971-72 were below 15 years. Among economically backward classes, the age of marriage is a matter of off-loading of girls as a liability at the earliest opportunity. There are in some communities inward-looking marital norms compelling early marriages in the scramble for the limited number of eligible boys of the concerned sect or clan. The age limits set by the Hindu Marriage Act do not touch the Scheduled castes and Scheduled tribes. Where female literacy is low, child marriages are rampant as in Uttar Pradesh, Bihar and Rajasthan. A Bill has been introduced in Parliament to raise the age of marriage for girls to 16 and that of boys to 21 from 15 and 18 respectively. It is hoped that the raising of the age of girls to 16 will conduce to slow down births. Offences under the Act would be cognisable and this may operate as an effective deterrent.

There are some other aspects of marriage laws calling for serious thinking and early attention. It is familiar knowledge that the economic conditions particuarly of

---

7. The New Jurisprudence by P.B.Mukharji, p. 62.

the middle classes have changed in such considerable measure as to call for fresh adjustments. A steadily increasing number of women are getting educated and in many cases it is found that unless both the spouses are employed they cannot run their household decently. This has given rise to new problems like matrimonial home, sharing of expenses, separate savings of spouses, rights and obligations of spouses *vis a vis* their children and so on. In England many of these problems have been tackled by relatively recent legislation like the Family Provisions Act, 1966; the Family Reform Act, 1969; the Administration of Justice Act, 1967; and the Matrimonial Proceedings and Property Act, 1970. Field studies on these matters will be helpful for suggesting measures for readjustment of domestic life and the directions in which it will be needed.

The Police Commission.—The appointment of a six-member Police Commission with Sri Dharma Vira as President and Sri N. Krishnaswami Reddi, formerly Judge, Madras High Court, as one of the members with wide terms of reference the main thrust of which is to evolve measures to improve the functional efficiency of the police administration is to be welcomed. A look at the gaps and shortcomings in administrative control, legal accountability and the social role of the police at various levels is long overdue. The days are gone when the police could be looked upon more as myrmidons of law and order ready to wield the lathi, more as an instrument of suppression than as a helper and friend of the people in distress. The identification of the police with the executive rather than as a law-enforcing agency answerable only to the Courts stems from the out-dated Police Act of 1861. There has been so far no comprehensive review at the national level of the police system despite the radical changes in the political, social and economic situation in the country. The separation of the judiciary from the executive had not freed the police from magisterial control in all matters relating to law and order enforcement. Not statutes alone but to a large extent executive directions have been guiding the actions of the police in launching prosecutions or initiating punitive actions. The enquiries now going on before the several Commissions of enquiry in regard to actions taken during the emergency period have brought to light the objectionable manner in which the police had been used. The legacies of the past which have tended to demoralise the police, corrode its sense of values and make it lose the confidence of the public cannot be shed unless the political parties agree on comprehensive legislation for abolishing the practice of executive direction in matters of law enforcement. At present it is as if there is an all round presumption of distrust of police. It will improve the position very much if the Constitution made it mandatory for all the branches of the police to be guided by statutory provisions in the exercise of their jurisdiction. To project the police as a guardian of peace and rescuers of people in times of need, to ensure a complete reorientation of police outlook and approach, to shield the police from political and executive interference in the discharge of its functions would be a difficult job that requires an imaginative overhaul of the training imparted to its members. The presence of persons who have specialised in social psychology and sociology on the Commission would have helped it to make really meaningful recommendations.

International scene: The SEATO.—A notable event of some international significance was the quiet death of the South-East Asian Treaty Organisation (SEATO) on 30th June. The SEATO was born in 1954 and was one of three multi-national organisations for collective defence formed during the East-West cold war. Its main aim was the containment of communism in South-East Asia. Its founding father was Mr. John Foster Dulless, the then U.S. Secretary of State. It members were the United States, the United Kingdom, France, Australia, New Zealand, Philippines, Thailand and Pakistan. Bangkok was its headquarters. An odd feature of the SEATO was that it designated the territory of non-members like Laos, Cambodia and South Vietnam as areas for

defence against communist aggression. France opted out of its military commitments in 1967 and withdrew financial support in 1974. Pakistan withdrew from the Organisation even earlier in 1973 when it failed to get its support in its conflicts with India. The other two Asian members, Thailand and Philippines suggested the winding up of the SEATO in view of the new power balance in South-East Asia in the wake of the emergence of a united Vietnam and Cambodia's becoming a communist State. The SEATO was accordingly wound up with none to shed a tear over its passing away. John Foster Dulles could hardly have visualised his military creation folding up without firing even a single shot in battle as the entire region of the former Indo-China fell into the hands of the communists.

Withdrawal of U.S. from I.L.O.—The withdrawal of the United States from the International Labour Organisation is another notable international event. The International Labour Organisation was originally created under Part XIII of the Treaty of Versailles in 1919. By constitutional amendments in 1945 and 1946 it became a "specialised agency" brought into relationship with the United Nations by a special relationship agreement. Its main object was that economic competitions between States or other similar conditions should not militate against the realisation of minimum as well as uniform standards of labour throughout the world. An outstanding feature of the Organisation is its tripartite character as it is representative in its bodies of Government, employees and employers marking a departure from the general trend of internationl practice that States alone should be represented in international institutions. The United States is a country with employment of labour on the grand scale. It is also making substantial contribution to the finances of the Organisation. Presumably because of a feeling that politics has intruded into the Organisation and that the U.S. is not able to have its influence felt in a manner commensurate with the importance of the country and the financial contribution it was giving, it has chosen to withdraw from that body. It is a pity that this should happen at a time when more and more of international co-operation would be welcome in the cause of world peace and security.

1977 New York Conference on the Law of the Sea.—The Conference of 157 nations of the world under United Nations auspices which met at an eight-week session in New York last year could not reach agreement over a single text for negotiating on the problems of international stewardship of the ocean floor beyond the limits of national jurisdiction so that the riches of the sea could be shared equitably by all the countries. The conference decided to meet again this year. Accordingly amidst hopes of a break-through at least this year, the 157 Nations Conference began an eight-week session at New York on 24th May, 1977. The discussions turned on the role of the international seabed authority to be set up and how the treasures of the sea are to be exploited by the mining arm of the authority. The United States urged that private companies should be allowed to have a key role in mining. Ideological differences as well as the self-interest of the participating nations have again precluded any final acceptable understanding. The Conference concluded on 15th July, and will re-convene in Geneva in March, 1978. For the precise results one has to see "the composite negotiating text" which would "show in foetus form the future child". The composite agreement is only for the hard negotiations ahead and is not a negotiated accord. The earlier rounds of talks had only generated 'single negotiating texts' reflecting the patterns of contention on subjects, such as the limits of the territorial seas; the demarcation of the continental shelfs; the spread and status of the economic zones beyond the territorial waters; the set-up of an international seabed authority; a forum for settling disputes on the distribution of the common heritage of the high seas'; and the rights of navigation over and scientific research in the waters of the coastal States, etc.

The composite negotiating text is however a step-forward in the sense that it

is a piecing together of all points of friction for final parleys, whereas all that the chief U.S. negotiator, Mr. Elliot Richardson, would say was, "I don't think I could very well say that the positions have softened, in the sense that in principle each side is holding for its basic approach, but there has been convergence", particularly on the matter of deep-seabed mining. He was obviously referring to the fact that the developing countries, which had originally insisted that an international authority should have charge of all exploitation of the sea's riches for fear that the advanced countries (exclusively in possession of the financial and technical resources required to do the job) would run away with the whole cake, have now accepted that there is a place for both private and international enterprises to mine the sea's resources, and that scope has to be given to those who have the financial and technological capacity to conduct exploitation. India has suggested that the proposed international agency and the multinationals be both permitted to do the exploration for a trial period of 20 years after which the situation could be reviewed.

Apart from what system of exploration should prevail, the key issues still to be negotiated are the legal status of the 200-mile economic zone, conduct of marine scientific research in that zone and the machinery for settlement of disputes between States. The maritime States want it specifically laid down in the treaty that the coastal States would have sovereign rights only over the economic resources of the 200-mile zone which would in all other respects have the character of high seas and be open to maritime and naval uses by all countries. The advanced countries also want freedom to conduct scientific research in a coastal State's economic zone. There are then the land-locked States which do not want to be left out in the cold. The Law of the Sea Conference is scheduled to meet again next year in Geneva and will have for a working paper the "composite negotiating text"—the fourth of the series—drafted in New York. The outstanding legal issues are so bound up with national sovereign rights and economic interests it would be a pleasant surprise if agreement on a treaty emerges from Geneva[8].

8. *The Hindu*, 20-7-1977.

NEW JUDGES FOR THE HIGH COURT.

It is gratifying that at long last the Central Government has started filling up the vacancies in the posts of Judges in the different High Courts in the country which had fallen vacant and remained unfilled for quite sometime and in quite a large number. A few days ago it was announced that seven Judges were appointed to the Allahabad High Court and six to the Karnataka High Court. Appointments have been made to certain other High Courts as well. The appointment of four Judges—Mr. S. Padmanabhan, Mr. M. A. Sathar Sayeed, Mr. T. S. Sathiadev and Mr. Nainar Sundaram—has come not a day too soon. It had been often pointed out that it was incongruous for Government to harp upon delay in the disposal of cases and backlog of cases in the High Courts when one of the contributory factors had been the Government's keeping a fairly large number of Judges' posts vacant whatever might be the reason therefor.

We offer a cordial welcome to the new Judges. Appointment as a Judge, though it may appear as an achievement, really puts a man on his trial inasmuch as just a tree is known by its fruits a Judge is inevitably judged by the quality of his judicial work, by his deportment and demeanour on the Bench. The credentials of the new Judges are full of promise as seen from the relevant details relating to them given hereunder. All of them will be having a fairly long tenure on the Bench, long enough to leave a mark. The time for assessment of their work will be when they retire. In the meanwhile it is to be fervently hoped that in the discharge of the duties of their exalted office they will bring to bear the qualities of receptivity, understanding, patience, independence and above all the human touch, maintaining the dignity of the Bench and the high traditions of their office.

Mr. S. Padmanabhan, comes from a distinguished family of judges and lawyers. After obtaining his honours

degree from the Loyola College, Madras, he took his law degree from the Trivandrum Law College. He set up practice in Travancore in 1947. After the re-organisation of States, he started practice in Madras. He also enrolled himself as an advocate of the Supreme Court in 1956, and made his mark both on the appellate and original sides. He is the son of the late Mr. K. Sankarasubbaier, Judge of the Travancore High Court and the brother of Mr. T. S. Krishnamoorthi Iyer, formerly a Judge of the Kerala High Court and currently a Senior Counsel of the Supreme Court.

Mr. M. A. Sathar Sayeed, had a brilliant academic, career, took his law degree in 1952 and worked in the offices of Mr. C. A. Vaidyalingam, Mr. K. Ramachandra Rao and Mr. T. Venkatadri, all the three becoming Judges. He enrolled himself as an advocate of the Madras High Court in 1954 and worked in close association with Mr. Justice M. M. Ismail and Mr. Justice P. R. Gokulakrishnan, before their elevation to the Bench. He was legal adviser to the Tamil Nadu Wakf Board, National Small Industries Corporation Limited and the Muslim Educational Association of Southern India. He was recently appointed Special Counsel by the State Government to conduct the appeal, on behalf of the Thanjavur Co-operative Marketing Federation Limited, Tiruvarur before the Tribunal against the orders of the Joint Registrar of Co-operative Societies (Surcharge). He is a cousin of Mr. Basheer Ahmed Sayeed, a former Judge of the High Court.

Mr. T. Sathiadev had been at the Bar for about 25 years and till his elevation Government Pleader. He had his education in the Presidency College, Madras. After securing his law degree from the Madras Law College, he worked as Legal Adviser to the Tamil Nadu Electricity Board and the Indian Overseas Bank. He had appeared in major arbitration disputes on behalf of the Indian Oil Corporation and the Government of India. He was appointed Assistant Government

Pleader in 1968 and Government Pleader in 1976.

Mr. Nainar Sundaram, who hails from Tirunelveli, is the son of a former District and Sessions Judge, the late Mr. Herbert Sundaram. After obtaining his commerce degree from the Loyola College, Madras, he took his law degree and enrolled himself as an advocate of the Madras High Court in 1955. He had his apprenticeship under Mr. Justice T. Ramaprasada Rao. He practised for some time in Coimbatore before coming to Madras and worked as assistant to the Special Public Prosecutor, Mr. N. Krishnaswami Reddi, before the latter was elevated to the Bench. He is known to be interested in Vedanta and takes keen interest in all cultural matters.

A CRITICAL NOTE ON "RENGA IYENGAR v. SIVASAMIPANDARAM" (1977) 2 M.L.J. 265: 90 L.W. 559.

By

S. GOVINDARAJAN, B.SC., B.L., *Advocate and Government Pleader, Chidambaram.*

The facts of the case are simple. The property belonged to "R". Under a document dated 17th August, 1957, "S" was given the right to collect the coconut usufructs for a period of one year. Every year upto 1967 "S" executed similar documents and there was no document subsequent thereto. "R" filed a suit in 1968 for permanent injunction or in the alternative for possession. "S" contended that the transaction was a lease of agricultural land, that he was entitled to the benefits of the Cultivating Tenants Protection Act and that the suit was bad for want of proper notice to quit.

Both the lower and lower appellate Courts held that there was a lease of both the land and the trees and that there was no proper notice to quit. "R", therefore, preferred a Second Appeal to the High Court.

Justice V. Ramaswami found that "S" was only a licensee and the transaction was not a lease. However his Lordship held that "S" is a lessee of the coconut usufruct for an indefinite period and so the transaction will amount to an agricultural lease of an interest in immovable property, in which case, the lease had to be terminated by a notice to quit as contemplated under section 106 of the Transfer of Property Act or grounds of equity, justice and good conscience.

It is respectfully submitted that the decision requires reconsideration.

In fact the later part of the judgment seems to run counter to the finding given in the earlier part and is contrary to the decisions of the Supreme Court and our High Court.

Even on facts, his Lordship seems to have overlooked the significant fact that the lease is not for an indefinite period but for a definite period of one year.

As early as 1953, the Supreme Court has held in *Firm C.J., Patel* v. *State of Madhya Pradesh*[1], that the right to collect timber, teak and tendu leaves is only a license and not a lease. This decision has been followed in several decisions of the Supreme Court and our High Court *Ananda Behera* v. *State of Orissa*[2], *Associated Hotels of India* v. *R.N. Kapoor*[3] *M.N. Clubwala* v. *Fida Hussain Saheb*[4] *B.M. Lall* v. *Dunlop Rubber Company*[5], *Panchapagesan* v. *Swaminathan*[6], *A. Govindasamy Vanniar* v. *S. Mahalakshmi Ammal and others*[7], *Arumugha Vellian* v. *Angamuthu Nattar*[8] and *Govindaraja Mudaliar* v. *Elliamman Temple*[9]. In *Commissioner of Income-tax* v. *Benny Kumar Subas Roy*[10], the Supreme Court has held that the terms "agriculture" would consist of basic operations like sowing, planting requiring expenditure of human skill and labour on the land itself and subsequent operations such as protection of crops, pruning, cutting harvest

1. 1953 S.C.J. 96: 1953 S.C.R. 476: A.I.R. 1953 S.C. 108.
2. (1956) 1 M.L.J. (S.C.) 69 : 1956 S.C.J. 96 : (1955) 2 S.C.R. 919 : A.I.R. 1956 S.C. 17.
3. 1960 S.C.J. 453 : (1960) 1 S.C.R. 368 : A.I.R. 1959 S.C. 1262.
4. (1964) 2 S.C.J. 448 : (1964) 6 S.C.R. 642: A.I.R. 1965 S.C. 610.
5. (1968) 1 S.C.J. 644 : (1968) 1 S.C.R. 23 : A.I.R. 1968 S.C. 175.
6. (1971) 2 M.L.J. 169.
7. (1963) 2 M.L.J. 137.
8. (1965) 1 M.L.J. 170.
9. (1972) 2 M.L.J. 357 : 85 L.W. 793: A.I.R. 1973 Mad. 176.
10. 1957 S.C.J. 740 : 1957 2 M.L.J. (S.C.) 145 : 1958 S.C.R. 101 : (1957) An.W.R. (S.C.) 145 : A.I.R. 1957 S.C. 768.

etc., and that in order to constitute "agriculture" both operations must co-exist. This decision has also been followed by our High Court in the various decisions referred to above. There is also the latest decision of the Supreme Court reported in *Board of Revenue* v. *A.M.Ansari*[11], in which the Supreme Court has held that a license does not create an interest in the property to which it relates while a lease does and an agreement relating to a right to collect the usufruct is only a license and not a lease.

Applying these principles laid down by these decisions we find that (1) "agriculture" must consist of both basic and subsequent operation (2) a mere right to collect the usufruct will not amount to "agriculture" and will not amount to any transfer of interest in immovable property and no interest in land is created.

With regard to the case under review it will be found that the agreement created only a right to collect the usufruct for a period of one year. There was therefore no "agricultural lease"; no interest in immovable property is transferred and there was no interest in immovable property created.

Under the Transfer of Property Act, a lease is a transfer of interest in immovable property. His Lordship has correctly found that there is no transfer of interest in immovable property and the grant is only a licence. It may be that the provisions of the Transfer of Property Act, with regard to the issue of notice to quit can be applied on grounds of justice, equity and good conscience to agricultural leases.

But here, it is a case of only licence and not a lease whether agricultural or otherwise. So there is absolutely no necessity to issue a notice to quit.

For the foregoing reasons the decision requires reconsideration.

---

11. (1976) 3 S.C.C. 512 : 38 S.T.C. 577 : (1976) 3 S.C.R. 661: A.I.R. 1976 S.C. 1813.

POWERS OF THE COMMISSIONER OF CORPORATION OF MADRAS.*

By

R. THILLAI VILLALAN, M.A.B.L.

In the first part of the Article two different definite findings were given:

I. The Commissioner of the Corporation of Madras has no power to take disciplinary action against Class III and Class IV employees of the Corporation without Bye-laws made by the Council under section 86 (1), sub-clause (2) of the Madras City Municipal Corporation Act, 1919. This was by Justice K.N.Mudaliyar in *P.G. Arunachalam* v. *Corporation of Madras by its Commissioner*[1].

II. "The Commissioner of the Corporation of Madras has power to take disciplinary action against the Class III and Class IV employees of the Corporation who were in service of the Corporation prior to the Tamil Nadu Amending Act LVI of 1961 which came into force on 14th April, 1962". This view was given by Justice M.M. Ismail in *M. Parthasarathy* v. *Corporation of Madras*[2] and *P.D. Balasubramaniam* v. *The Corporation of Madras represented by its Commissioner*[3]. In order to set right the legal position in this regard, the matter was taken for review in the *Corporation of Madras by its Commissioner* v. *P.G. Arunachalam*[4] stating that the petitioner, due to inadvertance, was not able to produce the unreported Division Bench decision of *L. Sivanarayana Das* v. *Corporation of Madras represented by its Commissioner and another*[5], by Veeraswamy, CJ., and Gokulakrishnan, J., which would make the petition to stand dismissed. But the petition was disposed of by stating. "Admittedly, the judgment of the Division Bench (Veeraswamy, CJ., and Gokulakrishnan, J.) in *L. Sivanarayana Das* v. *Corporation of Madras by its Commissioner and another*[6] has not been brought to my notice. The petitioner pleaded 'inadvertance' for his not producing the judgment of the Division Bench. I am afraid, under Order 46, rule 1. 'Inadvertance' is not a ground. The judgment of the Division Bench was delivered as early as 15th July, 1969, and it is significant to notice that the petitioner was the first respondent in that case. The respondent in W.P. No. 230 of 1971, (the review petitioner) was possessed of the knowledge of the existence of the judgment of the Division Bench since 1969. The plea of "inadvertance" is not a ground within the meaning of Order 47, rule 1 for reviewing the order of this Court.

Now, the actual position is made clear by P.S.Kailasam, CJ., and V. Balasubrahmanyan in the Writ appeal, the *Commissioner of Coporation of Madras* v. *P.G. Arunachalam*[7]. The Commissioner of Corporation of Madras has powers to take disciplinary action against Class III and Class IV employees if they entered service before the Amending Act LVI of 1961 came into force and he has no powers against them if they entered service after the said Act.

In the Writ appeal, P.S. Kailasam, CJ. said the following:

"The question that arose for consideration was whether the Commissioner had power to impose the punishment of stoppage of increment. The contention is that, though section 96 of the Madras City Municipal Corporation Act, 1919 (before its amendment by Act LVI of 1961) provided

* The first part of this Article was published at page, 9 Journal part of (1975) 1 M.L.J.
1. (1974) 1 M.L.J. 364.
2. W.P. No. 3290 of 1971.
3. (1974) 2 M.L.J. 394.
4. (1974) 2 M.L.J. 43 : 87 L.W. 454 (1) : A.I.R. 1974 Mad. 288.
5. W.A. No. 188 of 1967.
6. W.A. No. 188 of 1967.
7. (1977) 2 M.L.J. 274.

that the Commissioner could impose the penalty of withholding the increments of promotion including the stoppage of efficiency bar, the amended act did not provide for any such punishment. Section 36 of the LVI of 1961 corresponds to section 96 of the old Act. It provides that in the case of employees in Class III, to which the respondent belongs, the punishment which is provided for by the bye-laws made by the Council under section 349 could be imposed. It is common ground that no bye-laws have been framed by the Council. Therefore, the contention is that the Commissioner had no power to impose the punishment which he did, under the amended Act. To this contention the answer of Mr. S. Palaniswamy, the learned counsel for Corporation is that the amended Act provides for transitional powers under section 102 read with Schedule II of the Act. Section 102 of Act LVI of 1961 provides that the new Act should be read subject to Schedule II and power to remove difficulties. The provision states that in first giving effect to the provisions of the principal Act, they shall be read subject to the Rules in Schedule II. Rule 5 of Schedule II provides that every person included in the Corporation establishment immediately before the date of the commencement of the new Act and who was employed by the Corporation wholly or mainly in connection with the affairs of the Corporation immediately before the said date shall on and from that date, hold his office in the Corporation by the same tenure at the same remuneration and upon the same terms and conditions and with the same rights and privileges as to pension and gratuity and other matters as he would have held the same on the date aforesaid if the new Act had not been passed and shall continue to do so unless and until his remuneration, terms and conditions of service, and his rights and privileges are so altered as to be on the whole not less favourable to him than those to which he was entitled immediately before the said date. This provision makes it clear that an employee shall be subject to the terms and conditions of the office which were in force before the new Act was passed till bye-laws are framed under the new Act. The respondent was admittedly recruited to the Corporation service long before the new Act came into force and the old provisions are applicable to him. As the old Act is applicable regarding service conditions, the punishment imposed on the respondent is in accordance with law.

....This was the view of a Bench of this Court in W.A. No. 188 of 1967 (dated 15th July, 1969. The Bench observed that section 102 provided the power for making transitory provisions and that Schedule II to Madras Act LVI of 1961 by rule 5 clearly covered the gap brought about by the said amendment and preserved to the Commissioner all the disciplinary powers which he had immediately before the enactment and coming into force of Act LVI of 1961. In that case the employee belonged to Class III and was appointed to the Corporation service prior to the new Act. It was held that the employee would continue to hold the office by the same tenure at the same remuneration and upon the same terms and conditions and with the same rights and privileges as he was entitled to before the new Act.

....Learned counsel for the respondent brought to our notice a recent decision of a bench of this Court in W.A. No. 143 of 1974 where it has been held that the provisions of section 102, Schedule II are not applicable. In that case the employee was recruited after the amended Act came into force. Therefore that decision has no application to the facts of this case.... The Writ Appeal mentioned in the above judgment was against

the decision of Justice K.N. Mudaliyar in *Kuppusamy* v. *Corporation of Madras*,[8] by Veeraswami, C.J. and S. Natarajan, J.). Even after all these judicial pronouncements, the Corporation of Madras has not taken steps to frame bye-laws under section 86 sub-clause (2) of the Madras City Municipal Corporation Act, 1919. The lacuna created by the lethargy of the Corporation is still there.

---

8. (1976) 1 M.L.J. 280.

ANOMALY IN THE TAMIL NADU INDEBTED AGRICULTURISTS (TEMPORARY RELIEF) ACT (XV OF 1976).

By

T. S. SUBRAMANYA IYER, *Advocate. Tiruchy.*

The Tamil Nadu Indebted Agriculturists (Temporary Relief) Act (XV of 1976), which came into force on 15th January, 1976 and enured till 15th January, 1977 and extended by Act III of 1977, Tamil Nadu, suffers from a lacuna and an anomaly, in that, in the definition of the term "debt" it has not included a decree debt, unlike in Act XVI of 1976. In actual practice and in the working of the Act this kind of variation in the Agriculturists Temporary Relief Act as against the Tamil Nadu Indebted Persons Temporary Relief Act XVI of 1976 has resulted in a good deal of hardship to an appreciable size of really deserving agriculturists, who require relief. For, you cannot have a stay of execution of decree debts for an agriculturist, howsoever miserably he may be placed financially. Even the original Agriculturist Debt Relief Act has not excluded a decree debt. This difference in the definition of the term "debt" has been pointed out by Justice Ramaprasada Rao in (1977) 2 M.L.J. 466. He has observed that the legislators have presumably intended to deprive the relief in the case of agriculturists in regard to decree debts.

This discrimination against agriculturists is not equitable. The anomaly is apparent when it is seen that a debt so long as it does not enter into the portals of the Court, cannot be enforced, against an agriculturist debtor and he gets the relief. But no sooner than a wily creditor files a case and his debt crystallises into a decree the relief for the debtor vanishes. Agriculturist—debtors in Thanjavur and Tiruchy districts have been particularly hard hit, now especially by the fury and the ravages of the cyclone and it is not proper and fair that decree debts should be crushing them. The definition of the term 'debt', I believe, requires to be placed on a par with that in Act XVI of 1976.

BOOK REVIEW

I. THE INDUSTRIAL DISPUTES ACT, 1947 by *C.C. Anajwala*, Sixth Edition, 1977. (Publishers: C. Jamnadas & Co., 146-C, Shamaldas Gandhi Marg, Bombay 400002). Price Rs. 22.

Labour and industrial relations form a subject of constant concern. The Industrial Disputes Act was intended to achieve harmonious relations between labour and capital and to provide a machinery for settlement of disputes by adjudication and arbitration. How far the objectives have been realised remains a moot question. Since 1947, the Industrial Disputes Act has undergone a number of amendments. A major amendment was made by Act XXXII of 1976 inserting a new Chapter V-B containing special provisions relating to lay-off, retrenchment and closure in certain establishments. The present Central Government has proposed to re-orientate and overhaul the provisions of the existing Act.

The book under notice provides a section-wise commentary of the Industrial Disputes Act. The text of the Act embodying the amendments made in Maharashtra of which the amendment of 1976 amends sections 7 and 7-A of the parent Act providing for non-judicial persons being appointed as presiding officers of Labour Courts and Industrial Tribunals is furnished. The Central and Bombay State Rules and Notifications are also given as well as the latest case law. Questions like what is an 'industry' [Section 2 (*j*)] and what is an 'industrial dispute' [Section 2 (*k*)] which have given rise to a mass of case law have been carefully examined. In that context, the decision in *Workmen Madras Flying Club v. Presiding Officer*, (1977) 1 M.L.J. 90 could have been taken note of. The provisions of the Act have been explained in a simple, accurate and helpful manner. We commend the book to lawyers and to all concerned with or interested in labour problems.

II. THE SUPREME COURT LABOUR DIGEST 1950-1976, by *S.K. Agrawal*, 1977. (Publishers: Law Book Company, P.B. No. 4, Allahabad-1). Price Rs. 70.

Labour and employment are found in every walk of life. Civil services, University services, Banking services, mines, factories, industrial establishments, shipping etc. are all concerned with labour and management problems. An entire labour jurisprudence has grown out of the decisions of the Supreme Court of India during the last 25 years and more. G.M. Kothari in his book on Labour Demands and their Adjudication, Vol. 1 observes (Preface, p.xvi) that "the Indian judiciary has yielded to the country a very rich and vast crop of precedents of labour demands...... from almost a barren and fallow field of labour jurisprudence" and has 'handed down to the world community a jurisprudence, which has redeemed the lost faith of industrial masses in law and justice'. Such being the nature of the contribution made by the decisions covering every aspect of labour law, both statutory and common law, and prodigious being the output of such decisions, a separate and specialised digest of the Supreme Court decisions bearing on and elucidating labour disputes and employer and employee relationship will serve as a time saving device and ready-reckoner particularly to lawyers and others specialising in matters of labour.

In the Preface to the Digest, the author has mentioned nine features as outstanding and characteristic of his work. Among them are: (1) The totality of the law reports published in India has been exhausted in the preparation of the Digest and the totality of the reported and unreported cases published has been covered (2) The headnotes are framed with language extracted from the judgments on a scale so extensive and self-contained as to make them quotable in Courts. It would have been helpful if the author had appended a list of the law reports and journals used by him. Opinions may also differ as to the desirability of using digest headnotes for citation. Be that as it may, the work is certainly comprehensive. The topics covered by the Digest are neatly set out in alphabetical

order and the headnotes have been given lucidly. It is easy to agree with the author that the Supreme Court "with its comparatively much smaller span of existence has decided a much larger volume of legal problems than the Privy Council did during its whole tenure as our highest Court of justice". The author has therefore done well in bringing out this Digest relating to one branch of such legal problems decided by the Supreme Court, a digest which is both efficient and dependable. It should serve well lawyers and others interested in labour jurisprudence and labour problems.

III. WORKING CAPITAL MANAGEMENT by *Anil B. Roy Chowdhury*, 1978. (Publishers: Eastern Law House, Calcutta. Price Rs. 40 : £5 : $8.

It is trite saying that capital is the source of income and income is the fruit of capital. Broadly speaking the working capital of a business represents the finance required to run its day to day working or operation of its activities. In effect, it signifies the availability at all times of enough funds to meet the current obligations and when they have to be met. Corporate business can become fruitful and prosperous only if there is enough cash generation to be ploughed back in to the business for its survival as well as for its phased growth. The terms of reference to the study group constituted by the Reserve Bank in July, 1974 for providing guidelines for followup of bank credit reveals the importance of sound working capital management. In fact the solvency of a business and its reputation in that behalf turns in a large measure on the quantum of its working capital. At the same time it is apparent that profitability is a main objective of all business. Thus liquidity and profitability are juxtaposed. It becomes therefore a headache for the management to decide whether profit should be increased with possible adverse repercussions on the liquidity position of a business or to strike a just balance between the two factors.

The book under notice endeavours to review analystically the financial problem concerned with working capital management to ensure the efficiency of business as well as its profitability. The subject is discussed in 14 chapters with illustrations and case studies adverting *inter alia* to such aspects as Operating Cycle Theory, Cash Management, Source and Application of Funds and Financial Ratios and Working Capital. The discussions are throughout practical. Persons in charge of practical business where professional management techniques are applied as well as students of commerce and business administration will find the instant book eminently useful.

IV TAX PLANNING VIA TRUST by *Kumar Parikh and Divyakant Parikh*, 1977. (Publishers: Vora Prakashan, Ahmedabad-2) Price Rs. 15.

Planning in every field has become inevitable under modern conditions of life. Tax planning has come to be regarded as a vital function of accountancy and the legal profession. In *Levines case*, (1928) A.C. 121 it is recognised that it is sound law and certainly not bad morality for a person to so arrange his affairs as to reduce the brunt of taxation to a minimum and in *Raman's case* the Supreme Court has held "that a person is authorised to arrange his affairs for reducing his tax burden." A tax-payer is free to resort to a device to divert the income before it accrues or arises to him. to reduce his tax liability. Many of the loopholes in relation to devices like the Hindu undivided family, admission of minors to the benefits of partnership etc., used to divert the income of the planner have now been plugged fairly effectively. The utility of oral trusts and private family specific trusts are still untouched. Tax planning through such trusts to reduce one's tax burden continues therefore to be a live and profitable study.

The book under notice consists of six parts. The legal aspect of the Trust is dealt with in Part I. Part II with parts III and IV provides illustrations, and refers to the role of trust in Planning and provides drafts of trust deeds and wills. A digest of important case law relevant in regard to Tax planning is furnished in Part VI. The book also contains a discussion of sections 64 and 162 to 166 of the Income-tax Act, with calculation of

total income and reference to section 21 of the Wealth Tax Act. Guidelines are provided for filing income-tax returns. The book is written in a simple style. It should prove handy and useful to Tax Practitioners, Tax Officers, and Tax-payers.

V. TAXATION REFERENCE by *H.K. Saharay and Bijoy Sen Gupta*, 1977. (Publishers: Eastern Law House, Calcutta). Price Rs. 40 : £6 : $ 12.

Tax is an imposition by sovereign authority not correlated to any particular service rendered but intended to meet the expenses of the Government. It is either direct or indirect. Direct tax at present signifies the charge charegeable under Acts like the Income-tax Act, the Wealth-tax Act, the Gift-tax Act, the Estate Duty Act, the Super Profits Tax Act, the Companies (Profits) Surtax Act, Agricultural Income-tax and any other tax which having regard to its nature or incidence, may be declared by the Central Government to be a direct tax. Taxation is developing in many directions and the often abstruse and not lucid language in which taxation provisions are couched has given rise to subtle distinctions and to a plethora of decisions interpreting those provisions, so much so, lawyers as well as laymen have to grope, their way to get at the correct case law A ready referencer enabling them to spot out the relevant decisions to bolster up their stand and appreciate the correct position on any important question is bound to be welcome.

The book under notice endeavours to cover the entire feld of direct taxation stating the principles of law emerging from the judicial decisions constituting the *ratio decidendi*. A Comparative Table of *pari materia* povisions of the Wealth-tax Act, the Gift-tax Act and the Estate Duty Act is also provided. The Indexes relating to the Income-tax Act, the Wealth tax Act, the Gift-tax Act and the Estate Duty Act have been separately given. The book should prove useful as a *really* ready reference to lawyers and students of taxation law.

VI. THE BOMBAY SHOPS AND ESTABLISHMENTS ACT, 1948 WITH THE MAHARASHTRA SHOPS AND ESTABLISHMENTS RULES 1961, Fourth Edition by *C.G. Anajwala*, (Publishers: C. Jamnadas & Co., 146-C, Shamaldas Gandhi Marg, Bombay.) Price Rs. 15.

Tamil Nadu has a Shops and Establishments Act and that is of the year 1947 The Bombay Act is a year later. These Acts form a piece of social legislation. The Bombay Act is designed to prevent overwork and consequent adverse effect on the health of the employees within its purview. This is sought to be achieved by provisions covering working hours, rest, measures for health and safety payment of wages and leave salary. No attempt to regulate the relationship of master and servant is made. The Act applies to shops, commercial establishments, hotels, restaurants, theatres and places of amusement and entertainment. The Act is applicable to the entirety of the present Maharashtra and Gujarat States. The Act applies the Payment of Wages Act and the Workmen's Compensation Act to the establishments coming within its ambit. The enforcement of the Act is left to municipalities and local authorities. For 30 years there has been no major amendment to the Act. But recently a Bill has been introduced to amend the Act with a view to plug the loopholes brought to light in the working of the Act. Hitherto a distinction had been maintained between professional activity and activity of a commercial character as a result of which the liberal professions like law and medicine were regarded as outside the purview of the Act. The recent Amending Bill has expressly included within the definition of 'commercial establishment', the legal, medical and other establishments.

The book under notice gives the complete text of the Bombay Shops and Establishments Act, 1948, and the Rules and Notifications issued from time to time. It provides sectionwise annotations in the light of relevant case law. The texts of the Maharashtra Shops and Establishments) Amendment Bill (XXVI of 1977) and the Gujarat Shops and Establishments (Amendment) Act (XXVI of 1977)

amending the Bombay Act are set out in Appendix B and Appendix C respectively. The book is a welcome publication useful to owners of shops and establishments, the enforcement machinery, employees, lawyers and students particularly in the State of Maharashtra and Gujarat.

VI DRAFTING, CONVEYANCING AND PLEADINGS by *Dr. G.M. Kothari*, 1977. (Publishers : N.M. Tripathi (P.) Ltd., Bombay) Price Rs. 60.

Drafting of documents and pleadings in Courts and Tribunals call for high legal acumen and form an important sphere of advocacy. It is said that if the draftsman has been exact and clear and brief he has done well. And according to Du Parcq, L.J., it often happens that important decisions turn on one word and it is as well that draftsmen should bear that fact in mind *Dickinson* v. *St. Aubyn*, (1944) K.B. 454 at 459. Similarly if pleadings are inartistically drafted and the Court is not able to approach the real issue as the real contention between the parties is not brought out, the Court would be justified in doing justice on such basis as it thinks fit (*Surendranath Sud* v. *Standard Vacuum Oil Company*, A.I.R. 1977 S.C. 1454.) Good drafting can come however, only with long practice in applying the theoretical norms on the subject.

The present book consists of 16 chapters. The first eight chapters deal with drafting of documents and deeds. The other eight chapters are devoted to pleadings including drafting of petitions and applications, drafting of writ petitions and appeals to the High Court and Supreme Court. The book incorporates a chapter on Professional Ethics to meet the requirements of the law students in the final year of the law course. About 300 forms and precedents relating to most of the important and frequently used documents are selected to serve as a ready reference work of day to day value.

The author has adopted a practical and pragmatic method of case studies and legal craftsmanship in dealing with draftsmanship of different kinds of deeds and pleadings and has, on the whole, achieved a just balance between principles and applications. The author's approach has been influenced by background of the English law of Property as is seen from chapters 2 and 3. His use of terms and terminologies like 'real estate' 'messuages' 'coverts of woodland' 'advowson and glebe' etc., is rather out of tune in the context of contemporary Indian life. At page 79 in clause (*j*), presumably the reference to the Hindu Marriage Act, 1954 is a mistake for the Special Marriage Act, 1954, since a marriage under the former Act by a member of a Hindu joint family causes no disruption of the joint status. The book is a welcome publication. It should be of great assistance to the members of the bar, law students as well as to litigants, in short to law-men and laymen alike.

VIII. THE IMPORTS AND EXPORTS (CONTROL) ACT, 1947, by *Subodh Markandeya and Jhitra L. Bhadri,* 1977. (Publishers N.M. Tripathi Private, Limited, Bombay) Price Rs. 50.

The Imports and Exports (Control) Act which is in force throughout India is an important economic legislation. The extent and degree of control vary with and depend on the country's total economic and industrial development at a particular time. In a developing country like ours unfettered import is out of the question. We cannot afford to have an adverse balance of payment. Factors like the shifting pattern of international trade, existence of various monetary systems, revemping of long range priorities periodically in response to conflicting claims, changing consumerist needs of industry and commerce have made problems of export and import complicated. The importance of the subject can be gauged by the fact that the aggregate value of imports and exports is more than 1500 crores of rupees per year.

The control of imports goes back to the time of the second world war. By notification under the Defence of India Rules of 1939, imports of 68 commodities were regulated. Many such notifications were issued from time to time and a consolidated notification covering quite a wide range of commodities was issued in 1943. When the Defence of India Rules lapsed on the conclusion of the second world war the restrictions were kept alive by the Emergency Provisions (Continuance) Ordinance, subsequently replaced by the Imports and Exports (Control) Act, 1947. The Act, originally enacted as a temporary measure, was made permanent in 1971. Very important amendments to the Act were made by Act XII of 1976 based upon the recommendations of the Law Commission on Economic and Social Sciences. The provisions so added, namely, sections 4-B to 4-P and section 5-A imparted to the Act considerable force and vigour making it strict and effective in operation at the same time adding to its complexity.

The book under notice provides commentaries on the sections of the Act, The Introduction gives the historical background and the constitutional position of the legislation. The provisions of the Act have been explored and carefully examined. The relevant case-law has been considered and attention to the deficiencies and anomalies still found in the Act both from the view point of the authorities and of the citizens, has been drawn. An Appendix is provided containing the important statutory orders and notifications. The decisions in *Shah Poosali Mangilal v. The Secretary, Government of India, Ministry of Commerce,* A.I.R. 1976 Mad. 82, holding that the principles contained in the Policy Red Book have no statutory force so as to clothe any applicant for quota with a right to get it, and in *Madras Steelware Industry v. Joint Chief Controller,* A.I.R. 1977 Mad. 377, bearing on the scope of para. 292 of the Red Book (Import Trade Control, Hand Book of Rules and Procedure 1974-75) could also have been taken into account. On the whole, the book provides a lucid elucidation of the provisions of the Act in the light of relevant leading cases. The footnotes contain a wealth of information. On a not too familiar statute complex in its provisions, to have provided a comprehensive and useful commentary is a laudable achievement. The book should prove helpful to lawyers, judges, the concerned departments, and men involved in trade and commerce.

GOVERNMENT AS A LITIGANT.

By

V. LAXMANAN.

There is now much talk about the clearance of arrears and early disposal of disputes in Courts. The Government is seized of the matter and has turned its attention towards that to do its best. It has appointed the Law Commission, which is touring the country, to go into that question. But with all this I would like to pose a question to the Government (Central as well as State). The question is, what is the conduct of the Government as a litigant? It remains to be seen, whether as a litigant the Government has been of any help in clearing the arrears or has contributed to the accumulation of arrears.

To answer the question posed above, I wish to refer to the conduct of the Union of India as the owner of railways, for consideration because I have had occasion to watch its conduct as the counsel appearing against it in suits for compensation. (The Government referred to hereinafter is the Union of India owning the railways). As the biggest, I may even say, the mightiest, litigant the Government should set an example to others. It should be a model litigant worthy of emulation by others. But the truth seems to be otherwise, despite the fact that it enjoys certain privileges under the law.

The Government is treated differently from other litigant public. I wish to refer to the differential treatment given to the Government prior to the initiation of proceedings in a Court of law and thereafter. It is well-known that no legal proceeding can be initiated against the Government without issuing a notice under section 80 of the Code of Civil Procedure. Issuing a notice under section 80 of the Code of Civil Procedure is a *sine qua non*. Further, two months must elapse before filing the suit; so a suit filed against the Government may be dismissed if it is not preceded by a notice mentioned above. Similarly a suit filed after issuing a notice can be also dismissed if it is filed before the expiry of two months. This illustrates the imperative nature of section 80, Civil Procedure Code.

Now let us assume that a party issues a notice under section 80 of the Code to the Government. The Supreme Court enunciates the object of such notice in the following words: "The object of the notice contemplated by that section is to give to the concerned Government and public officers opportunity to consider the legal position and to make amends or settle the claim, if so advised without litigation. The legislative intention behind that section in our opinion is that public money and time should not be wasted on unnecessary litigation, and the Government and public officers should be given a reasonable opportunity to examine the claim made against them lest they should be drawn into avoidable litigations". So the party sending the notice will be expecting a reply in the fond hope that his claim may be settled. But usually what happens is that either no reply at all is sent by Government in time or the reply sent is merely an acknowledgment of the receipt of notice. The reply would also be very crisp. It will read: "Received your notice. It is under consideration". The reply is important because once the notice is issued it means the ball is set in motion and the legal process has started to move. But no 'considered' reply will be sent till the expiry of two months. Instances are not wanting where considered replies to the notices were sent after one year. Is not the time sufficient to reply? Is it not their duty to reply in time especially when they know that after the expiry of two months a suit will be filed against them? The reason seems to be that they do not take serious note of the notice. The delay can be attributed only to callousness and indifference.

The party sending the notice, failing to receive any definite reply, will have no other choice but to file the suit after the expiry of two months, unless the law of limitation permits him to wait for some more time. So much prior to the institution of suit.

The suit is filed. The Government Pleader, (the railways have their own counsel) appears on behalf of the Government, files a memo. of appearance and takes time "to answer the plaint". Now we come to the differential treatment extended to the Government after the institution of suit. Rule 5 of Order 27 of the Civil Procedure Code provides: "The Court in fixing the day for the Government to answer the plaint *shall allow not less than three months time* from the date of the summons for the necessary communication with the Government through proper channel and for the issue of instructions to the Government Pleader to appear and answer on behalf of the Government and may extend the time at its discretion". But rule 1 of Order 8, dealing with any other defendant says". The defendant may, and, if so required by the Court, shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence". Thus we find that while the Government is given three months' time to answer the plaint no such time is given to the ordinary defendant. Without going into the question whether there is any justification for such a provision or not we will see whether the answer to the plaint is filed within the time allowed. It will be a wonder if the statement is filed within time. The three months time will not be sufficient for them and the counsel will go on asking for further extension of time even to the extent of irritating the Courts. The Government will take another 6 months or one year.

At long last the grand day dawns when the Government chooses to file its statement of objections. The statement is filed. It makes interesting reading to those who care for technicalities. The Government always finds it convenient to raise some technical defence either under substantive law or procedural law, but more often under procedural law and a defence under section 80 comes in handy. The Government would try to build up a defence based on section 80, Civil Procedure Code, ignoring the very legislative intention (quoted supra) behind it. On facts the party may have a good case against the Government but there might have been some lapse in observing a technical formality and here lies the trap for him. The Government would not hesitate to use the trap whatever be the merits of the claim of the party on facts. I do not say that the Government should concede all the claims against it even if there be technical bars. What I mean to say is that the Government should not stretch technicality too far. It should avoid taking umbrage under technical pleas.

The defence founded on section 80 may be that the notice is not valid or that the notice has not been properly served or that there is no identity of party or any other defence that could be raised only after some strain. One particular defence raised by the Government may be taken up to show how they bask under technical pleas and objections.

One of the defences usually raised is that there is no identity of party. That is, the person filing the suit is not the person who issued the notice and so the suit is not maintainable. This particular defence was raised in a case decided by the Kerala High Court *P. P. Abubacker* v. *Union of India*[1]. In that case a notice under section 80 was sent to the Government by "Kozikode lime centre", and the suit was filed by "Kozikode lime centre by the Proprietor, P. P. Abubacker". The Government took up a defence that there was no identity of party *i.e.*, the person filing the suit was not the person who issued the notice and so the suit was not maintainable. The matter ultimately came up for decision before the Kerala High Court. Justice V. R. Krishna Iyer (as the then was) has rendered an illuminating and instructive judgment. In the course of the judgment, he refers to the observations of the Supreme Court with reference to section 80 and they are:

"The object of notice under section 80, Civil Procedure Code is to give to the Government or the public servant con-

1. A.I.R. 1972 Ker. 103.

cerned an opportunity to reconsider its or his legal position and if that course is justified to make amends or settle the claim out of Court. The section is no doubt imperative; failure to serve notice complying with the requirements of the statute will entail dismissal of the suit. But the notice must be reasonably construed. Any unimportant error or defect cannot be permitted to be treated as an excuse for defeating a just claim". *Beohar Rajendra Sinha* v. *State of M. P.*[2]

"........The purpose of law is advancement of justice. The provisions in section 80 of the Civil Procedure Code are not intended to be used as booby traps against ignorant and illiterate persons". *State of U.P.* v. *Sheo Prasad.*[3]

After making a reference to the observations of the Supreme Court the learned Judge makes his own observations and has given a direction to the Government as to the mode it should follow in contesing the claims against it. With reference to the technical defences raised under section 80 he observes:

"I may mildly add that in a welfare state such provisions must be construed in a kindly spirit". He further observes: "The idea is not to arm the Government and public servants with secret weapons but to behave in a straightforward way and settle up disputes when litigation could be avoided". In respect of the case on hand the learned Judge adds, "I am satisfied that no confusion of identity has been caused in the defendant and the present plea has served only to lengthen the litigation. It has landed the State in avoidable wastage of time and money—precisely the opposite of what section 80 was meant for. I hold the view that a technical objection which diverts the normal course of trial is like a forensic hijack which should be frowned upon when raised without substantial grounds on the merits, more so when the State puts forward such a place.

"......But it must be remembered that the State is no ordinary party trying to win a case against one of its own citizens by hook or by crook; for, the State's interest is to meet honest claims, vindicate a substantial defence and never to score a technical point or overreach a weaker party to avoid a just liability or secure an unfair advantage, simply because legal devices provide such an opportunity. The State is a virtuous litigant and looks with unconcern on immoral forensic successes so that if on the merits the case is weak Government shows a willingness to settle the dispute regardless of prestige and other lesser motivations of more private parties to fight in Court.

"The layout on litigation costs and executive time by the State and its agencies is so staggering these days because of the large amount of litigation in which it is involved that a positive and wholesome policy of cutting back on the volume of law suits by the twin methods of not being tempted into forensic showdowns where a reasonable adjustment is feasible and even offering to extinguish a pending proceeding on just terms, giving the legal mentors of Government some initiative and authority in this behalf". The idea underlying the present discussion cannot be better expressed than by the above words.

I wish to conclude with the words that a very useful purpose will be served if the conduct of the Government as a litigant undergoes a change on the lines indicated above. I am sure that such a change will go a long way in clearing the arrears, because the Government is the biggest, mightiest and the perpetual litigant.

---

2. (1970) 1 S.C.J. 118 : (1969) 3 S.C.R. 955: A.I.R. 1969 S.C. 1256.
3. A.I.R. 1969 N.S.C. 7.

CONFLICTING DECISIONS AS TO MEANING OF DEBT IN DEBT LEGISLATIONS.

By

T. R. VENKATARAMANAN, B.COM., B.L., D.P.P.A., *Advocate.*

The interpretation suggested by me in these columns under the heading 'Are costs decreed debts under the Tamil Nadu Act X of 1975'[1] and it was judicially so declared by Ramaprasada Rao, J., in *Govindaswamy* v. *Balakrishna Reddy*[2], proceeds on the reasoning, that in view of the difference in the definition of the word 'debt' under Act XV of 1975 and Act XVI of 1975 and the conspicuous omission of the word 'decree' in the earlier Act it is obligatory on the part of an agriculturist to pay his decree debts and he is not entitled to the benefits of stay during the existence of the Moratorium Act XV of 1975.

However, Balasubrahmanyan, J., in a subsequent decision of 7th March, 1977 has held in *Venkatavaradhan* v. *Janardanan*[3], that decree debts are also debts under the Act XV of 1975 and hence the execution of a decree against an agriculturist has to be stayed during the life of the Act XV of 1975. Explaining his view, Balasubrahmanyan, J., has also referred to the earlier view of Ramaprasada Rao, J., and brushed it aside as '*per incuriam*'.

It is not the purpose of this article to find out which of these two views is correct (for each has force in its own individual way!) but to look at them from a higher angle.

The High Court, being a Court of Record, is, bound by its own decisions. Ordinarily a single Judge is bound by the views of an earlier judgment as well as that of a Division Bench and Full Bench decisions (*Peregrino Rodrigues, in Re.*[4]) It is also the duty of the subordinate Courts to follow the views of the High Courts to which they are attached[5]. However, when mutually exclusive and collectively contradicting judgments are pronounced by the High Courts (however logical they may be) they will place the subordinate Courts 'with alternatives to choose' making judicial consistency impossible. This will also give rise to a situation wherein the Courts below may get over the judgments of the High Court, a position not desirable. In fairness, it should also be admitted that a single Judge has got limited power not to follow the views of a brother Judge. Such a situation can arise when the Judge deciding the subsequent case feels that the earlier view is '*per incuriam*'[6]. In the matter under review the earlier view was not followed by Balasubrahmanyan, J., because he felt that the earlier view of Justice Rao was *per incuriam* and did not go hand in hand with the general provisions of the Act.

It is significant to note that the concerned Ordinances of 1975, which were later converted into Acts did not originally contain any provision relating to chit liability. But the High Court held for the first time that 'chit liability is not debt'[7]. So amendments were subsequently brought to introduce sections 2 (*ix*) and 2 (9) in these Acts respectively expressly excluding chit liability from the purview of these Acts. In another case, (and in the absence of any express provisions), it has been held that an action to recover advance money paid is not a suit for recovery of debt[8]. Again mahar, even though arising out of a contract of marriage between two Muslims, is held to be not a debt[9].

1. (1975) 2 M.L.J. (Journal) 51.
2. (1977) T.L.N.J. 41 : (1977) 2 M.L.J. 466 : 90 L.W. 707 (Judgment dated 7-1-77).
3. 90 L.W. 376 : (1977) 2 M.L.J. 426.
4. I.L.R. (1945) Bombay 702: 46 Bom.L.R. 916; A.I.R. 1945 Bom. 173.
5. *Futtulal* v. *Parbati Kunwar* 42 I.A. 155 : 18 M.L.T. 61 : 29 M.L.J. 63 : A.I.R. 1915 P.C. 15 also see *Poomalai* v. *Annamalai*, A.I.R. 1944 Mad. 124: 56 L.W. 494 : (1943) 2 M.L.J. 515.
6. (1915) I.L.R. 42 Cal. 1140 : 30 I.C. 681; *Chaitram* v. *Bridhi Chand* referred to 54 C.W.N. 8 (from 50 years digest Vol. 12 Page 1669).
7. (1976) T.L.N.J. 375; *Arunagiri Chit Fund* v. *Mohd. Haneef*.
8. (1976) T.L.N.J. 419 : 90 L.W. 169 *Ponnammal* v. *Shanmugasundaran*.
9. (1976) T.L.N.J. 319 : (1977) 1 M.L.J. 255 : A.I.R. 1978 Mad. 27. *Syed Abbas Sahib* v. *Minor Musthivi Begum*.

In a very recently reported decision, the Madras High Court has held[10] that a person who has obtained the benefits under Act XXXVIII of 1972 claiming to be non-agriculturist, cannot again claim the benefits under Act X of 1975, as an agriculturist. In this case Ramanujam, J., has, applying the principles of estoppel held that a person who has once claimed debt relief as a non-agriculturist cannot again claim debt relief as an agriculturist under another law, even if he became an agriculturist subsequently. These go to show that neither the definition of 'debt' nor stay of proceedings can be said to be fixed.

When laws restrict the right of a person born out of contract, the interpretation more favourable to the person to whom damage is done is to be preferred. This is based on the principle of equity. 'Statutes which encroach on the rights of the subjects whether as regards person or property are subject to strict construction. It is a recognised rule that they should be interpreted, if possible, so as to respect such rights. If there is ambiguity as to the meaning of the section, inasmuch as it is a disabling section, the construction which favours the freedom of the individual (to contract) should be given effect[11]

In the matter under review there are two sets of interrelated legislations on the same topic of debt relief. Yet both of them deal with two different sets of persons, namely, agriculturists and indebted persons (non-agriculturists). Surprisingly and significantly there is admittedly a difference in the definition of the word 'debt' in Acts XV and XVI of 1975. So an interpretation of a collateral legislation with different wording has given rise to two possible views. Under these circumstances, in my view, Justice Balasubrahmanyan might have referred the matter to a Division Bench so as to put the controversy at rest. It is also significant that the Legislature has not brought in so far any change in the Agriculturists Relief Act contradicting the views of Ramaprasada Rao, J.

It is humbly submitted here that conflicting decisions of the High Court on a matter like this will in the long run create confusion in the Courts below.

---

10. (1978) 1 M.L.J. 74: *Margachari* v. *Krishnaswami Mudaliar.*

11. Maxwell on Interpretation of Statutes 11th Ed. Page 275-276.

ASSETS REALISATION — COMPANY IN LIQUIDATION.

By

SEETHAARAAM.

A company is wound up for reasons more than one, on many occasions. Many are seldom re-constituted or re-started. Upon the winding up of a company an Official Liquidator is appointed. The process of winding up or the liquidation proceedings as is commonly called is carried out under orders of Court. Since the object of liquidation is to clear up the money affairs and especially to settle the account of a bankrupt estate, the most important item of work of the Liquidator of that bankrupt estate is, to firstly realise the assets of the Bankrupt Estate.

A company, be it/a Banking Company or a non-Banking Company, is not wound up only when it becomes a bankrupt company. It may be wound up for many other reasons contemplated under the Act. Here it would be necessary for us to know that there are basically two enactments under which Companies are wound up. A Banking Company is wound up under the provisions of the Banking Regulation Act, 1949 and a non-Banking Company is wound up under the provisions of the Companies Act, 1956.

In respect of a non-Banking Company which is wound up the Official Liquidator under the provisions of the Companies Act is appointed whereas in respect of a Banking Company the Court Liquidator, under the provisions of the Banking Regulation Act, is appointed. Though they are two different authorities, the primary nature of their duties is one and the same *viz.*, the realisation of assets.

Liquidation means the settlement of accounts of a bankrupt estate. Therefore the work of either the Court Liquidator or of the Official Liquidator does not end with the realisation of assets but also extends to the act of settlement of the accounts; the accounts of the creditors and the contributories.

In this study it is proposed to limit the area of activity to the first act *viz.*, the act of realisation of assets. It may be seen that unless the assets are realised there does not arise the question of settling the list of creditors and contributories and payment to them thereof. The work of realisation of assets involves many-sided activities on the part of the Liquidator and whether it is the Court Liquidator or the Official Liquidator the first duty is to realise the assets, that too, as speedily as possible.

The assets in a liquidation means the assets of a company when it was working and something more added when it comes into liquidation. To be enumerative, the assets to be realised include all the assets mentioned on the assets side of a balance sheet excepting for the last item *viz.* Miscellaneous Expenditure, like Preliminary Expenses and the share (call) amount *viz.*, the contributory liability for which orders have been passed by the Court. The assets to be realised are both moveable and immoveable assets. Full details of these properties are found in the balance-sheet of the company, the form for which has been prescribed both under the Companies Act and the Banking Regulation Act.

The balance-sheet of a Banking Company is more elaborate in its contents when compared to the balance-sheet of a non-Banking Company. This is specially so in the field of "Sundry debtors, loans and advances".

In order to provide legal help and to speed up the process of realisation both in the Companies Act and the Banking Regulation Act enabling provisions have been incorporated. Let us look at the provisions of the Companies Act, 1956. (*a*) We see, under section 456 the Liquidator takes possession of all the property, effects and actionable claims to which the company is or appears to be entitled. The use of the words "is or appears to be entitled", are noteworthy. The Liquidator can take possession of such properties which in his knowledge, though not complete, are believed to be the property of the company. For

this end the liquidator can call upon the prescribed judiciary to take possession of such properties. In this connection it is very important to see the provisions of sub-section (2) of section 456 which laws down that from the date of the order of winding up of a company all the property and effects of the wound-up company are deemed to be in the custody of the Official Liquidator.

In the light of this it is evident that the liquidator is given overriding powers in the matter of taking possession of the properties that belong to the company which is wound up.

The question of taking possession of the assets of the company arises only in respect of moveable and immoveable assets. The assets may be in the custody of some outsider, with or without reasons true or false, ascertainable or not. The property may be in the possession of a secured creditor, an alleged mortgagee, a decree-holder, a tenant or even an outsider.

In this process it is not for our consideration the case of a secured creditor who is or is not in possession of the property but who after valuing the security chooses to stand outside the liquidation.

The question of taking possession of the assets from sundry debtors is complete once the liquidator gets the possession of the books. It is also possible to get particulars of these sundry debtors once the statement of affairs is filed under section 454 of the Companies Act, 1956, with the liquidator.

Normally the liquidator gets an idea of the assets of the company from the following: (*i*) The books and records of the company; (*ii*) the statement of affairs; (*iii*) The balance-sheet etc., of the company filed with the Registrar of Companies; and (*iv*) the petitioning creditor if the winding up is on the petition of a creditor, contributory or an interested party.

Apart from the types of assets discussed above, in a liquidation proceeding, as mentioned earlier, a liquidator has to take into account the amount due to be collected, if any, from the contributories. Further he has also the amounts decreed against the delinquent directors or any other concerned person to be recovered under section 543 of the Companies Act, 1956.

In the process of taking possession of the properties and effects of the company, the liquidator is given assistance of several agencies and of many enabling provisions. A perusal of sections 453, 456, 468, 469, 477 and 479 of the Companies Act, 1956 would go a long away in this direction. It therefore settles down that the assets of all descriptions of a company wound up, vests with the liquidator of the company automatically whatever and wherever they are and excepting for a liquidator, none others can lay hands over the same. The provisions under the Banking Regulation Act, 1949 in this aspect are similar to the provisions under the Companies Act, 1956. A perusal of sections 39-A, 45-D, 45-E read with the provisions of the Companies Act, 1956 mentioned above, would make this clear. The Liquidator having taken possession of the assets and having obtained sanction of the Court under section 457 of the Companies Act, 1956 proceeds to realise the same.

The realisation of the fixed assets of the company is comparatively an easy process as there could be little objection from outsiders. It is the realisation of the other forms of assets *viz*., the sundry debts, loans and advances, the contributory liability and misfeasance decrees that pose considerable problems.

It is seen that in the process of realisation from the sundry debtors etc. different procedures are followed by the Liquidators. Some of the liquidators file the list of debtors into the Court along with an application under section 477 (1) and (5) of the Companies Act, 1956. The Court thereafter summons the debtors. On the date of hearing, if a debtor on his examination admits that he is indebted to the company the Court decrees the amount payable in one or more instalments. In the case of contesting debtors, the Liquidator is directed to file a suit

under the provisions of the Civil Procedure Code. It is seen that the Court does not pass *ex parte* decrees against any debtor under these provisions.

Some other liquidators follow the procedure of issuing notices to the debtors, calling upon them to pay the amount due by them within a specified date. In cases of failure the question of filing a regular suit under the Civil Procedure Code is followed.

In respect of a Banking Company under the provisions of the Banking Regulation Act, 1949 the process has been made simpler by the introduction of section 45-D. This procedure is identical with the procedure followed by some liquidators under section 477 of the Companies Act, 1956. It is under the provisions of section 45-D of the Banking Regulation Act, 1949 even *ex parte* decrees are passed by the Courts.

It is a doubtful matter as to how far the liquidators are utilising the enabling provisions under section 446 (2) of the Companies Act, 1956 which is similar to the provision in section 45-B of the Banking Regulation Act, 1949, because in contested cases or proceedings under section 477 and in cases of non-payment after issue of demand notice, the liquidators follow the procedure of instituting suits against the debtors in the other Courts under the provisions of the Civil Procedure Code.

The act of obtaining a decree against the debtor and the execution thereof in case of non-payment, in terms of the decree, are time-consuming and laborious. The procedural and legal formalities involved therein are too tiring. It is of course not to complain as such against the procedure. The filing of suit, filing of counters, framing of issues, the number of adjournments, coming up of cross-claims, disowning of liability, examination, cross-examination etc. are too numerous and thus in most of the cases they delay the entire proceedings for several years.

In execution cases where the properties of the debtor are to be brought to book, there is the additional procedure for attachment, sale, etc. Invariably in those cases where some moveable or immoveable property is involved, the liquidator is faced with the problems of claims by outside parties, settlement of these claims, decrees, appeals therefrom to the High Court etc. etc. This process consumes an unimaginably long duration causing undue delay.

The position in respect of Banking Companies where the list of debtors is filed into Court under section 45-D of the Banking Regulation Act, 1949 is slightly different. There a decree is obtained against the debtor without much difficulty, but however the time consumed in the suits appeals execution proceedings, certificate proceedings and in the proceedings of cross claims, etc. remain the same. The point of difference in respect of proving of the debts between the case of Banking and a Non-Banking Company is that in the case of a Banking Company the documents of a Banking Company are deemed for all purposes to be evidence against the debtor, see section 45-F of Banking Regulation Act, 1949. The absence of such a provision in the Companies Act, 1956 acts as a great restraint to the Official Liquidator.

There is also one more point of difference existing between Banking and Non-Banking Companies in the matter of limitation. A perusal of section 458-A of the Companies Act, 1956 and section 450 of the Banking Regulation Act, 1949 would throw light on this aspect. Though the basic idea of liquidation of a company is to stop the company from further deterioration and to safeguard the interest of creditors and contributories, the balance weighing in favour of the creditors and contributories of a Banking Company is on the basis of small, poor deposit-holders. This aspect, how fully it justifies the discrimination, is still a debatable point as basically the creditors are creditors whether of a bank or of other company in liquidation.

As between the obtaining of a decree and its execution, the latter is more tedious and more time-consuming. Many a time because of miscellaneous claims,

counter-claims or title suits etc. and appeals therefrom, the decree stands as decreed for years and years. It also happens that in certain cases the entire case is called back and re-started.

It is necessary that a time-limit, or a stage limit is placed in a suitable way to limit the multiplicity of the proceedings in liquidation. The appealable limit and a time-limit for entertaining counter-claims should be placed. While considering the question of huge arrears in various High Courts and the Supreme Court the Central Government has come out with one such suggestion in a general way.

In the case of decrees obtained by Banking Companies in liquidation under section 45-D of the Banking Regulation Act, 1949 the decrees are executed through the certificate officers as these decrees could be realised as arrears of land revenue. But it is interesting to note that though the liquidator files the certificate with the concerned Certificate Officer requesting him to realise the amount as an arrear of land revenue under section 45-T of the Banking Regulation Act, 1949, it has been the experience that the concerned Revenue Officer does not proceed to realise the debt in the said way. On the contrary, he starts proceedings like a civil Court and follows all the procedures of the Civil Procedure Code. The Revenue Officer does not discriminate between the certificate filed before him by a Court Officer and others and does not also take into consideration that the certificate filed by the liquidator is on the basis of a decree passed by the High Court under its original jurisdiction. The very purpose and the object of section 45-T is lost as the certificate debtor takes advantage of the proceedings followed by the Certificate Officer and brings in all the defences under him including the denial of the debt and prefering claims and counter-claims. Many a time many miscellaneous suits and title suits are preferred and stay of certificate proceedings obtained. When this situation is allowed the very purpose of speedy winding up proceedings is lost. It is in fact necessary, that, wherever defence is offered in those proceedings only an appeal against the High Court's decree should be filed and no other proceeding entertained.

SUGGESTIONS.

1. At present, the provisions of the Indian Companies Act, 1913, are applicable in respect of companies winding-up prior to 1st April, 1956, the date from which the Companies Act, 1956, came into force. It is seen that there are many enabling provisions incorporated in the Companies Act, 1956, which have a better effect as compared with the Indian Companies Act, 1913. The Rules framed by the respective High Courts under the provisions of the Indian Companies Act, 1913 vary from Court to Court. In view of this treatment there are practical difficulties encountered both by the Official Liquidator and also by the Court Liquidator in conducting the winding-up proceedings of the companies in liquidation by following different procedures. It is therefore suggested, that in order to speed up the winding up proceedings and also to have a uniform procedure followed by all the Liquidators in respect of all the Companies in liquidation, the question of differentiation in the application of the provisions of the Indian Companies Act, 1913 and the provisions of the Companies Act, 1956, should be done away with. It would therefore be necessary to amend the provisions of section 647 of the Companies Act, 1956.

2. In respect of the decrees obtained by the Liquidators it would be highly necessary to have a suitable provision in the Act so that the properties of the debtor whatever they are and wherever they are, stand attached automatically as and from the date of the decree. In so far as the debtors appearing in person, in the Court before the passing of the decree, they should be directed by the Court to file by means of an affidavit the list of properties owned by them. This would safeguard the question of realisation by the Liquidators as otherwise it is very likely that the debtors dispose of their properties between the date of decree and the date of attachment etc, unless otherwise there is an attachment of the pro-

under the provisions of the Civil Proce- In this connection the provisions under the Public Demands Recovery Act are worth considering.

3. The Official Liquidator obtaining decree against the directors in the case of misfeasance should be enabled to have the facility of having an attachment on the properties of the directors concerned as suggested above in the case of debtors and also against the legal representatives of deceased directors.

4. There should be a bar prescribed under the Act beyond which a matter in winding up can be taken up in appeal by the debtors, directors and contributories against whom a decree for money has been obtained. In this connection the provisions of the Public Demands Recovery Act, where a limit of this kind has been prescribed may be considered. In this connection it is worth considering the suggestion thought of by the Ministry of Law of the Government of India in the matter of speedy disposal of the large volumes of pending cases in several High Courts and in the Supreme Court.

5. While section 45-T of the Banking Regulation Act, 1949, provides for recovery of the amount due as an arrear of land revenue no procedure has been prescribed under the said section. In the absence of such a procedure the Collectors are proceeding on the lines prescribed under the Public Demands Recovery Act or the procedure prescribed under the Civil Procedure Code, 1908. This step is in no way beneficial and it is in no way helpful to speedy winding up proceedings. It is therefore necessary that separate rules are provided under this section or that the section itself is amended to provide for the details in regard to service of notice, sale and the matter of appeals. Over and above these, there should also be a time-limit prescribed within which the entire certificate proceedings should be completed subject however, in special cases where the Collector has to obtain special sanction from the higher authorities for continuing the certificate proceedings beyond the said period of one year.

6. Section 45-C of the Banking Regulation Act has to be amended to bring the same in line with section 446 of the Companies Act, 1956.

7. Section 458-A of the Companies Act, 1956 should be amended so as to be in line with the provisions of section 45-O of the Banking Regulation Act, 1949.

8. A suitable provision, in line with the provisions of section 45-F of the Banking Regulation Act, 1949, should be introduced in the Companies Act, 1956.

9. Provisions of the Companies Act, 1956 should be so amended as to enable the Official Liquidator, to obtain decrees on the lines on which decrees are obtained under section 45-D of the Banking Regulation Act, 1949 by the Court Liquidator.

DELETION OF CLAUSE (2) IN SECTION 47, CIVIL PROCEDURE CODE.

By

T. S. SUBRAMANYA IYER.

Much has been said about the need to reduce the cost of litigation, and also quicken the disposal of cases. This is with a view to make justice cheap enough, even for the poor and to obviate the criticism, that justice delayed is justice denied. But in actual practice and the working of the procedural law, we find that we are going in a reverse gear. This may be illustrated by the recent amendments of the Code of Civil Procedure by Act CIV of 1976, at least or at any rate in section 47 of the same. Section 47 provided a cheap and quick remedy by sub-clause (2) as it stood before the introduction of the amendment in the following terms *viz*., "The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may if necessary, order payment of any additional Court fees". This was a very wholesome, and salutary remedy for all cases in execution, however complex or trivial in nature. On an order passed erroneously by the executing Court, be it trifling or otherwise, you could immediately take the matter in appeal to the appellate Court, generally the District Court. A petition to set aside a sale allowed or dismissed could be brought to the appellate Court. The Court fee for the appeal in such a small amount is merely one rupee. In another case like where excess property of a defendant is sold in execution and delivery ordered etc., the matter could be appealed. We have a crop of cases now under the Debt Relief Acts coming under section 47 such as stay of execution etc. And there may be ever so many conceivable instances coming within the terms, "All questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to execution, discharge or satisfaction of the decree........" which are dealt with in the lower Court that could be taken on appeal by the aggrieved parties.

Now by deletion of the above-mentioned clause (2) no appeal could be filed against an order passed in execution by the executing Court. The cheap quick remedy is taken away and one will have to take the matter in revision only to the High Court in the metropolis. And a revision to the High Court though it may be handy and possible in the hands of rich litigants, is certainly a very costly one to the poorer sections. The real sufferers on account of the above amendment are the large segment of people, the poor litigants in mofussil stations who probably have to deal much with section 47, Civil Procedure Code. The work in the District Courts already reduced by taking away the revisional jurisdiction in Rent Control cases, would be still further diminished if appeals coming under section 47 are also deprived. The amendment therefore virtually takes away by the left hand what is given by the right. I am afraid that the amendment of section 47 in a great hardship to many a litigant. Not being well conceived or considered, I believe it would be proper and just that the deleted clause should be reintroduced. It may not be out of place here to quote what a former Chief Justice of the Supreme Court; Mr. S. M. Sikri in his inaugural address in 1971 to the Punjab and Haryana Bar said: "I have never appreciated why Governments want to treat administration of justice as a commercial venture and derive profit from it. This must stop. If it does not, the public should be made aware of it".

RECRUITMENT, APPOINTMENT AND SERVICE CONDITIONS OF THE EMPLOYEES OF MADRAS CITY CORPORATION UNDER MADRAS CITY MUNICIPAL CORPORATION ACT (IV OF 1919).

By

R. THILLAI VILLALAN, MADRAS.

The failure to frame bye-laws under section 349 of Madras City Corporation Act of 1919 by the Council is not only coming in the way of maintaining discipline and controlling the conduct of the Class III and Class IV employees of the Corporation Establishment but also in regard to the method of recruitment, appointment, promotion and service conditions.

For this purpose, we have to look mainly to four sections of the Act, *i.e.*, sections 85, 86, 93, 349 (2). Section 85 (*c*) runs as follows:—Every appointment to any post included in Class III or Class IV shall be made by the authority, specified in sub-section (2) of section 93. Section 86 (1) states that save as otherwise provided in that Act, the classification, methods of recruitment, conditions of service, pay and allowances and discipline and conduct of the Corporation Establishment shall be .... (*ii*) in the case of employees included in Class III and IV be bye-laws made by the Council under section 349.

Section 93 (2) runs as follows:—Save as otherwise provided in that Act, appointment to all posts in Class III and Class IV under the Corporation, the pay or the maximum pay of which exceeds one hundred rupees per mensem, shall be made by the Commissioner from the list of candidates approved by the Appointments Committee and in the order of preference indicated in the list. Appointment to all other posts in Class III and Class IV under the Corporation shall be made by the Commissioner subject to the bye-laws made by the Council.

Section 349 (1) provides:—The Council may make bye-laws not inconsistent with that Act or with any other law to provide (1) for all matters expressly required or allowed by this Act to be provided for by bye-law.

A dispute regarding promotion of non-Graduate Upper Division Clerk and Graduate Upper Division Clerk as Section Manager in the ratio 4 : 1 fixed by the Appointment Committee but not approved by the Council came up before Ramanujam, J., in *K. Ramamurthy* v. *The Corporation of Madras by its Commissioner, Ripon Buildings, Madras and another.*[1]

The contention of the petitioner as regards the fixation of ratio of 4 : 1 as between the non-Graduate Upper Division Clerks and Graduate Upper Division Clerks is that the said ratio has been fixed only by the Appointment Committee without the requisite sanction of the Council and therefore, it has no validity in law. Reference was made by the learned counsel for the petitioner to sections 86 and 93 of the Madras City Municipal Corporation Act, 1919, to substantiate his plea that in the case of employees in Class III (which comprises the Section Managers), the Council alone is authorised to make rules or by-laws regarding the classification of service, methods of recruitment and conditions of service and pay and allowance and discipline and conduct and that the Appointment Committee has no power to prescribe a ratio between the non-Graduate Upper Division Clerks and others for the purposes of promotion to the post of Section Managers.

---

1. (1977) 1 M.L.J. 116.

The learned counsel appears to be right in the said submission. Section 86 (1) (*ii*) says that in the case of employees included in Class III and Class IV, the classification, methods of recruitment, conditions of service, pay and allowances and discipline and conduct of the members of that class are to be regulated by by-laws made by the Council in exercise of its powers under section 349 which specifically enable the Council to make by-laws not inconsistent with the provisions of the Act or with any other law to provide for all matters expressly required or allowed by the Act to be provided for by by-laws. Section 93 provides for the constitution of an Appointments Committee and has not given the power to frame by-laws or regulations regarding the principles for recruitment or for promotion. The principles have to be laid down by the Council acting under section 349 while the Appoinment Committee makes selection on the basis of those principles and sends proposals to the Commissioner who is the appointing authority.

In this case, admittedly, it was not disputed that the formula of 4 : 1 between the non-Graduate Upper Division Clerks and Graduate Upper Division Clerks in the matter of promotion was laid down by the Appointment Committee. But this was not placed before the Council for sanction. As already pointed out, all matters relating to the classification, recruitment conditions of service, pay and allowances and disciplinary conduct have to go before the Council. Since the said ratio 4 : 1 prescribed by the Appointment Committee, did not have any sanction or approval of the Council as required under section 86 of the Act, the said formula has no legal basis.

When specifically asked whether the formula had the approval or sanction of the Council at any time, the learned counsel for the first respondent, the Corporation of Madras, submitted that the matter was never placed before the Council and its sanction obtained. Therefore, the ratio of 4 : 1 formulated by the Appointment Committee was only in the stage of proposal or suggestion and it cannot have and validity in law.

The learned counsel for the second respondent attacked the validity of the said formula of 4 : 1 on another ground as well. He submitted that as per the rules prescribed for promotion to the post of Section Managers from Upper Division Clerks, only graduates are qualified, that non-Graduates cannot at all seek promotion to the post of Section Managers and that the ratio 4 : 1 fixed by the Committee contravened the rules. In support of this submission, he referred to paragraphs 1015 and 1021 of the Madras Corporation Code. Paragraph 1015 provides that for promotion to the post of Section Managers and Head Clerks, a degree of the Madras University is essential. Paragraph 1021 of the Madras Corporation Code which deals with promotions in the indoor establishment, however, proceeds on the basis that in addition to the graduates, non-graduates who have put in not less than 10 years of approved service as Upper Division Clerks are also eligible for promotion. The contention of the learned counsel for the second respondent that only graduate Upper Division Clerks can seek promotion to the post of Section Managers cannot therefore be accepted. But it was unnecessary to go into the said submission of the learned counsel for the second respondent in detail, as the ratio of 4 : 1 had to be held invalid in any event. Therefore, the formula laid down by the Appointment Committee fixing a ratio of 4 : 1 in the matter of promotion to Section Managers from amongst the non-Graduate Upper Division Clerks and Graduate

Upper Division Clerks was held to be bad for want of sanction of the Council. The relief claimed by the petitioner in the writ petition was to quash the order of the first respondent, dated 6th February. 1975. According to the petitioner, this impugned order was based on the ratio of 4 : 1. But the impugned order did not indicate that it was based on the said ratio; it merely appointed two individuals to the posts of Section Manager. It is not known whether this was been done in pursuance of the ratio of 4 : 1 or whether it had been done in pursuance of paragraph 1021 of the Madras Corporation Code which makes the post of Section Managers selection posts. The Section Manager's post has been treated as a selection post in paragraph 1021 of the Madras Corporation Code and it says that persons of real merit, efficiency and capacity irrespective of seniority are to be selected for such posts from the qualified persons. Though the petitioner may be a person qualified for promotion, he being a non-graduate with 10 years service as Upper Division Clerk he cannot claim promotion purely on the basis of seniority in view of the rule relating to promotion contained in paragraph 1021 of the Madras Corporation Code. It was not therefore possible for the Court to set aside the impugned order, dated 6th February, 1975. The ratio of 4:1 fixed by the Appointment Committee having however been set aside, the petitioner and the second respondent have to work out their rights, if any, before the first respondent.

The delay in framing bye-laws by the Council is the root cause for setting aside the ratio of 4 : 1 fixed by the Appointment Committee. But, in this case, the absence of consideration of one aspect is very significant, *i.e.*, the Upper Division Clerk or Graduate Upper Division Clerk is drawing salary in the scale of pay Rs. 250-10-300-15-450. The salary exceeds one hundred. If that is so, section 93 (2) empowers the Commissioner to appoint persons from the list of candidates approved by the Appointments Committee and in the order of preference indicated in the list without sanction by the Council. Here, the Appointment Committee indicated the order of preference by fixing a ratio 4 : 1 for the list of candidates to be appointed by the Commissioner. Only in the case of candidates who are drawing salary less than one hundred rupees and other cases, appointment shall be made by the Commissioner subject to the bye-laws made by the Council. This has to be rectified by way of review or appeal, if the Corporation has so chosen to work out the remedy.

Another interesting question is regarding the power of the Council of the Corporation in appointing in Class I-A and Class I-B and Class II employees of the Corporation. This falls under section 87 of the Act and came up before Ramaprasada Rao, J., in *S. Sarada and another* v. *State of Tamil Nadu, represented by the Secretary, Education Department. Madras*-600009 *and others.*[2]

Section 87 runs as given below:—87 (1) If a vacancy occurs in any office included in Class 1-A, Class B or Class II or any new office in Class 1-B or Class II is created, the Council shall within three months appoint any qualified and suitable person to hold such office. (2) If the State Government refused to confirm the appointment so made, the Council shall appoint some other qualified and suitable person within forty-five days from the receipt of the order refusing confirmation. (3) In default of any appointment being made in accordance with sub-section (1) or sub-section (2), as the case may be,

2. (1974) 1 M.L.J. 466.

the State Government may appoint a person who in their opinion, is qualified and suitable to hold the Office and such person shall be deemed to have been appointed by the Council. (4) Pending an appointment under sub-section (1) or sub-section (2) the Council may appoint a person to hold the Office temporarily and assign to him such salary as it may think fit. Provided always that the salary so assigned shall not exceed the maximum fixed by the State Government by rules in respect of the Office.

A post of Assistant Education Officer fell vacant in the Corporation. Long-after three months after the post fell vacant, the Council passed a resolution selecting the name of *P* for the post and *P* who was a B.T. Supervisor was appointed temporarily to the post pending approval by the Government.

However the Government acting under section 87 (3) of the City Municipal Corporation Act, appointed another person and reverted *P* from the post of Assistant Educational Officer. Aggrieved by the said order, *P* filed a petition for the issue of a writ challenging the said order. In the light of the statutory provisions, the contentions of parties may be considered. Normally if a statute prescribes a formal time-limit for the performance of a statutory duty without specifying any consequence, in default of compliance with such a mandate, then such a prescription is directory and not mandatory. It would be sufficient to refer to the following decisions which throw light upon the discussion on the point as to what is mandatory and what is directory. The leading case is that of the Privy Council reported in *Montreal Street Railway Company* v. *Normandin*[3] The principle therein stated is that where the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only and not imperative. In *Rattan Anmol Singh* v. *Ch. Atma Ram*[4] the Supreme Court said that when the law enjoins the observance of a particular formality, it cannot be disregarded and the substance of the rule must be followed. This principle was followed by the Supreme Court in *Baby Ram* v. *Smt. Parsanam.*[5] No doubt, that was a case which arose under the Representation of the People Act and an election contest was reviewed by the Supreme Court. Gajendragadkar, J., adopting the earlier observations of the Supreme Court in various cases made a distinction between defects which are of a substantial character and those which are not of a substantial character. In essence the Supreme Court has repeatedly said that when a statute prescribes a mandate, may be in relation to time within which the statutory functionary should act or may be it relates to any other formality, such a mandate ought to be complied with if the non-observance of it would cause a serious defect and would enable the statutory authority to act in any manner it likes. It would be encouraging intransigence on the part of the statutory functionary if it were allowed lightly to disregard prescriptions made by the statute regarding the manner of exercise of power and particularly in a case where a consequence is provided in the Act itself

3. (1917) A.C. 170.

4. 1954 S.C.J. 731: (1955) 1 S.C.R. 481: (1954) 2 M.L.J. 435: A.I.R. 1954 S.C. 510.

5. 1959 S.C.J. 42: 1959 S.C.R. 1403: A.I.R. 1959 S.C. 93.

in case the peculiar prescription as to time, as in this case, is not observed. In the language of the learned Chief Justice in *Guruswami Reddiar* v. *Secretary, Regional Transport Authority, South Arcot* [6], where a statutory provision prescribes a time-limit for doing a certain thing it is always a matter of construction whether its consequence is one of inhibition. The provisions of the statute themselves may give an indication. In other cases, the circumstances of the situation, or the justice of the matter may have a bearing. Therefore, in a case where a peculiar consequence is expressly provided for in the statute itself, then the general consideration as to whether the non-adherence to the rule would lead to injustice or affection of right of third parties are considerations which are really alion to the problem. Therefore, if a statute, having regard to the objects for which its provisions relating to the appointment of officers to the establishment of the Corporation are concerned, says that a vacancy should be filled up within a period of three months by the Council and if it also provides that in default of such an appointment by the Council the State Government can intervene and act on their own and make the appointment, then this consequence makes it clear that the prescription as to time is not purely directory but is obligatory.

I may also refer to a decision of the Supreme Court in *Raja Buland Sugar Company Limited, Rampur* v. *The Municipal Board, Rampur*[7] which deals with such a proposition:

> "The question whether a particular provision of a statute which on the face of it appears mandatory inasmuch as it uses the word 'shall' is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and for the purpose the object of the statute in making the provision in the determining factor. The purpose for which the provision has been made and its nature, the intention of the Legislature in making the provision, the serious general incovenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory".

In the instant case, therefore, it has to be seen whether a serious genaral inconvenience or injustice to persons has been done. The writ petitioner was aware that she was only appointed temporarily to the post pending approval by the competent authority. This by itself shows that the writ petitioner had no right to the post for her to seek for the discretionary relief under Article 226 of the Constitution. It is only in a case where there is an infringement of a vested right that a person can be said to be inconvenienced or affected. But when the said right which is agitated is incomplete and not vested, then the person who seeks for the enforcement of such an inchoate right obtained by her cannot be said to be an aggrieved person. In the present circumstances it cannot be said that any public inconvenience or much less any inconvenience to the writ petitioner has occurred. She was occupying the post temporarily knowing fully well that she should quit the Office if the Government does not approve of the resolution of the Council. The principles enunciated by the Supreme Court that in case where a general inconvenience

6. W.A. No. 1 of 1973.
7. (1965) 1 S.C.R. 970: A.I.R. 1965 S.C. 895.

has to be averted the situation created by the irregular exercise of power by a statutory functionary has to be winked at and tolerated does not squarely apply to the instant case.

In the decisions the proposition is well-established that a bare prescription as to time without furthering the intention by providing any consequence in case of non-compliance with the same has always been understood not as a mandate, but as a directive which is excusable and tolerated because it is of no consequence. But if on the other hand the prescription as to time is a well thought of directive coupled with a duty to act accordingly, then such a rule as to time has to be understood as a mandatory rule.

Section 87 (1) has to be read with section 87 (3). Sub-section (1) of section 87, no doubt, barely refers to a rule of time within which the Council has to act and fill up a vacancy occurring in the Office enumerated in that sub-section. Sub-section (3) however provides for the consequence in case where the Council fails to act within the time prescribed. The language of sub-section (3) is a pointer for interpreting the intention of the Legislature as to whether the rule as to time is directory or mandatory. If the Council makes a default in filling up a vacancy occurring in Class II Office, with which we are concerned, and so act in accordance with the prescription as to time, the residuary power to appoint a person who in the opinion of the State Government is qualified and suitable to hold the office springs automatically and and if an appointments is made such a person shall be deemed to have been appointed by the Council. This consequence projecting the residuary power in the State to act in default has a special significance as it has an impact on the real meaning and intent of the expression "shall within three months appoint" appearing in sub-section (1) of section 87. If no such appointment is made, then in the popular as well as in the legal sense a default has been made in the matter of appointment in accordance with sub-section (1). Thus reading sub-section (1) in conjunction with sub-section (3), a meaningful purpose in the matter of appointment of Offices in a vacancy in the specified officers appears. Even the marginal note is indicative of such a purpose. It speaks of the time within which a vacancy in certain posts must be filled up. Though, no doubt, marginal notes are not valuable guides for interpretation, they can certainly act sometimes as a basis to interpret. The word 'default' in sub-section (3) has to be understood as an omission. In *Fakir Chunder Dutt* v. *Ram Kumar Chatterjee*[8] the word 'default' was understood grammatically as a failure to perform. It is one of the cardinal rules of interpretation that the plain and grammatical meaning of the words in a statute should first be thought of before adopting any other meaning which is not ordinary and popular unless there is an ambiguity in its meaning or there are compelling circumstances leading the Court to adopt such a meaning. I do not find any such extraordinary circumstances in this case to interpret the word 'default' in sub-section (3) of section 87 in a manner other than ordinary. Understanding the word 'default' as an omission, the question is whether the verb 'shall' in sub-section (1) has to be still understood as merely directory or as 'may'. I have already referred to the salient principle that if a power is coupled with a duty, then such coupling makes the exercise of power a compulsory event and does not vest in the authority invested with such power a discretion to act as it pleases or beyond

8. (1904) I.L.R. 31 Cal. 901 at 908.

the directive, which is to be understood as a mandate annexed to the exercise of such a power. If the Council fails to appoint a qualified and suitable person to hold the Office in case any vacancy occurs in it within three months from the date of the occurrence of such vacancy in accordance with section 87 (1) then it appers to me that the residuary power of the State Government to act and appoint a suitable person of their choice is unquestionable as it is automatic.

The Supreme Court has repeatedly held that if a statute lays down the *modus operandi* for the statutory functionary to act and if the pattern and manner of such acting is clearly set out, then no other mode of effectuating the intention of the Legislature is available to such a functionary.

In our case the Legislature has designedly provided a pointer in a case of an omission on the part of the Council to appoint within the prescribed time. If that is the basis for the challenged order and the State acted under section 87 (3) and exercised their power to appoint the 3rd respondent after noticing the default committed by the Council, it cannot be said that they acted without jurisdiction or that the order impugned poses an apparent error of law or any other apparent error.

As the appointment of the writ petitioner was not made within three months from the date when the vacancy occurred, the Council made an initial mistake in selecting her even though the 3rd respondent was senior to her in service. As a matter of fact, the record discloses that the merits of all the candidates considered by the Council and by the Government were equal. The salient principle of selection is that if everything is equal as between the competing candidates then the seniormost has to be selected. This was also not borne in mind by the Council when it made the appointment beyond time. These factors were borne in mind by the Government when it acted under its residuary powers under section 87 (3) of the Act and appointed the 3rd respondent to the post.

W.P. No. 1459 of 1973 (1973):—The point for consideration in this writ petition was very simple. The writ petitioner had been appointed by the Council as a reliever in case any vacancy arises in future. Such an appointment is not squarely within the meaning of section 87 (1) of the Act. The vacancy contemplated in section 87 (1) is not an expected or anticipated vacancy but a real vacancy. The writ petitioner was appointed as substitute in leave or any other vacancy that may arise. It is therefore clear that as on the date of appointment she was not to fill up a vacancy which had arisen before three months from the date of appointment. It is only to enable the writ petitioner to act in the contingency of a leave vacancy or any other similar vacancy arising that she had been appointed as a stop-gap measure for purposes of continuity and eventually in public interest. Probably this was done by the Council in exercise of its rights as a primary administrative body functioning under the Act. The State Government interfered with such a decision of the Council treating it as if it was an appointment made under section 87 (1) and by providing for themselves power to act under section 87 (3). As I said, the appointment of the writ petitioner by the Council is not under section 87 (1) and it cannot be. In snch circumstances, the residuary power under section 87 (2) or (3) is not available to the State Government to set aside such an administrative order of the Council. Whatever power the State Government may have otherwise under the provisions of the Act, it has no power to disturb that order, under the guise of exercise of power under section 87 (3). The impugned order

expressly says that the appointment of the writ petitioner is as a relieving officer and not as an officer who would permanently fill up a post which has fallen vacant. As the appointment cannot be interpreted to be one under section 87 (1) the State Government cannot assume power under section 87 (3) to set aside that order, in this behalf there is an error apparent, in so far as the appointment of the writ petitioner for the purpose as above has to be sustained as the State Government has exercised jurisdiction when it has none under section 87 (3) and in this behalf there is an error of law apparent on the record. I may incidentally add that the State Government while passing the challenged order did not expressly refer to the appointment of Sarada to fill up leave vacancies. But the Corporation of Madras obviously understood the order of the State Government in that way. There is no disturbance of that part of the Council's resolution by the State Government in so far as Sarada is concerned. Viewed in this light the petitioner cannot complain. But as the order has been understood by the Corporation of Madras so as to deprive her of the right to act in the leave vacancy though she has been appointed as such by the Council in exercise of its authority as the administrative functionary in the Corporation, she has come up to this Court. It is in this perspective that she is entitled to relief.

In this case, Government came into the scene after nearly six years. Action or inaction in framing bye-laws or filling posts within the statutory period will affect the employees in a very drastic manner. This aspect has to be borne in mind by public bodies when they are dealing with the life-problem of the nerves of their Establishment.

"JUSTICE TO THE POLICY-HOLDER" UNDER SECTION 39 OF THE INSURANCE ACT IV OF 1938.

By

T.A. VARADARAJAN, M.A., B.L., D.P.P.A., *Advocate, Standing Counsel, Life Insurance Corporation of India, Madurai Division, Tamil Nadu.*

The recent discussion appearing in '*The Hindu*' under the title "Justice to the policy-holder" has prompted me to address myself to an allied subject in the realm of life insurance, the same being.

"Title and right, to the policy amounts of life assured under section 39 of the Insurance Act IV of 1938".

The effect of section 39 of the Act, (in this discussion reference to the Act will mean the Insurance Act IV of 1938), on the right of the nominee to the policy amounts, is not free from difficulty. I am confining my discussion to the limited question of the right of the nominee as against the heirs of the deceased, life-assured, under the above section. As per the provisions and the scheme of the Act, in this regard, sections 38 and 39, deal with assignment and transfer of insurance policies, and nomination respectively by the policy-holder. The above two sections, present a complete self-contained code, in regard to the devolution and distribution of the policy amounts, in certain contexts, provided for, in them. Assignment *simpliciter* of the fruits, under the policy does not require elucidation, since there is not much of controversy, in regard to the absolute title of the assignee, in such cases over the amount.

But the same cannot be said of nomination prescribed under section 39 the Act. What is the rationale and object behind such a provision, *viz.*, the process of nomination by the policy-holder, its legal effect and basis? The policy-holder is desired to make an election, among his near and dear and asked to name that person or persons, so as to have that name specifically enshrined in the policy itself to secure to him, by payment, the amount under the policy, after it matures for payment, in the event of the death of the life assured. Nomination is revokable. There is no fetter on the life assured, to cancel a nomination and nominate another in the place of the prior nominee, in contra-distinction to assignment which becomes unalterable and operates as a transfer *inter vivos.*

In what manner has this nomination to be understood? How has it been actually interpreted and followed by Courts? If it does not conform to accepted norms, what are the remedies open? It shall be my endeavour to discuss and answer the above points, in this paper.

Section 39, is itself divided into seven sub-sections, with two provisos. I am not dealing here with the effect of sub-section 7, which attracts section 6 of the Married Women's Property Act, 1874. Untramelled by judicial decisions, and inhibitions attendant on such case law to which I shall advert later, let me first extract the relevant sub-sections of section 39 and deal with their purport, import and interpretation, on well-settled principles.

Sub-section (1) reads:—

"*The holder of a, policy of life insurance on his own life, may,* when effecting the policy or at any time, before the policy matures for payment, *nominate the person or persons to whom the money secured* by the policy, *shall be paid,* in the event of his death."

Provided that, where a nominee is a minor, it shall be lawful for the policy-holder, to appoint in the prescribed manner, *any person to receive the money,*

secured by the policy, in the event of his death, during the minority of the nominee."

Sub-section (5) is as follows:

"Where the policy matures for payment during the life-time of the person whose life is insured, or where the nominee, or, if there are more nominees than one, all the nominees die before the policy matures for payment, the amount secured by the policy *shall be payable to the policy-holder or his heirs* or legal representatives, or the holder of Succession Certificate, as the case may be."

Sub-section (6) reads to the following effect:—

"Where the nominee, or, if there are more nominees than one, a nominee or nominees survive the person whose life is insured, *the amount* secured by the policy *shall be payable to such survivor or survivors*."

The meaning and interpretation, to be put on the above clauses will clinch the position and the rights of the nominee to the amount secured under the policy.

The following is an accepted rule of interpretation of a statute, that, where there is a specific statute on a specific subject, the provisions of that statute on that subject, have to prevail. There can be no application of, or invoking of any other general law, in regard to that subject:

Keeping the above stautory rule in mind, there can be no dispute that the provisions of the Insurance Act, 1938 alone will govern the rights under an insurance policy and not any general law. *Generalia specialibus non derogant*—Special excludes general.

Section 39 (1) and 39 (6), which are the substantive distributive clauses, enact that the holder of a policy.....may.... nominate the person or persons, to whom the money.........*shall be paid* in the event of his death and the nominee surviving the life assured, *shall be paid* the amount insured. The proviso to sub-section 1, enacts that he can appoint any person *to receive* the money, on behalf of a minor nominee. The name of the nominee gets engrafted in the policy itself, for which provision is made, in its tabular columns.

Nowhere does this Act, or any section thereunder provide any machinery for collection, by anyone, of the policy amount, on behalf of the heirs of the life assured, on his death. Nor is there any scope or reason, for such a provision in this Act, for reasons set out below. The specific words used are "*shall be paid*" and "*receive*", which mean and intend that the nominee has a full fight of disposal over the same. There is no definition clause like "nominee" in the Act at all, to acquire any special meaning or significance for that word. Section 39 (1) used the word 'nominate' in the first instance and only in the proviso and later sub-sections, the word "nominee" to describe the person so named. The dictionary meaning of the word 'nominate' is 'to name a person.' *Thus, the word nominee is not used in any technical sense, and it is not a term of art in the Act.* Thus there is no scope or warrant, for invoking the theory of a nominee under section 39, being or becoming a trustee or agent of the life assured's heirs or legal representatives. He is clothed with the right to receive the amount and left free to deal with it in any manner he likes. The nominee is not under any liability to account to anyone, for the money paid to him or received by him.

Further, a close look-up of sub-section 5, extracted above will demonstrate the correctness of the interpretation put forth above by me and expose the fallacy underlying the theory of

trusteeship and collective agent imputed to the nominee. This sub-section (5), provides that, in the event of the death of the nominee, before the policy matures for payment, the amount secured *under the policy, shall be payable to the policy-holder or his heirs or the legal representatives or the holder of Succession Certificate, as the case may be.* In this particular context, nominee is not contemplated and provided for, for payment. Does it not clearly proclaim that under section 39 (1) and 39 (6), nominee alone is exclusively contemplated in his individual capacity and not as trustee ?

Thus, the legislature was fully aware as to when and under what circumstances and contexts, the title and right to the policy amounts enure to the heirs or legal representatives of the life assured, and when it should not devolve on them, but only on the nominee for himself alone and has made provision for the same, and also accordingly provided specifically for different situations as well. Thus, the intention of the legislature is clearly reflected in the very section 39 itself as to in what context, the heirs or legal representatives or holder of Succession Certificate themselves have a right to the amount secured under the policy.

Nominee is given a rather special rank and position than the heirs and legal representatives of the life assured, in certain circumstances and background and there is no justification to go behind the clear provisions of the Act, in this regard, and spin a theory of trusteeship and collection agent for the nominee, on behalf of somebody else.

It is too farfetched and impossible of acceptance that when a life assured enters into a contract with the insurer, the Life Insurance Corporation of India, and exercises his choice of nomination under section 39, by naming a most endearing person of his, he does it with the sole idea of making that person, a trustee or collection agent with no personal or beneficial interest for him (nominee), but only with the onerous liability to account to the heirs, etc., for the said money, and hand it over to them. No such idea or motive is entertained and ever occurs in the mind of the policy-holder when he makes the nomination. In fact, he entertains the opposite *mens rea* of benefiting the nominee, individually and personally alone and not in trust for others.

It is too artificial and opposed to the realities to inject and induct in the mind of the policy-holder, notions of a trust and agency, when he makes a solemn nomination. *Many hundreds, nay many thousands of policy-holders (lives assured), would get disturbed, disillusioned and turne turtle, in their graves, if ever they should come to know, that their objects of affection by nomination, should get displaced by some one else, whom they did not want to benefit,* (they may be anyone, and in some cases even wife and children) should knock away the *money by some imaginative process (not even by any legal fiction) for which there is no sanction anywhere in the statute.*

If really the intention of the authors of the statute, had been that the insurance policy amount, on the death of the life assured, intestate should devolve on his heirs at law, nothing was easier for them, than to delete section 39, empowering the policy-holder to nominate a person, to receive the sum *and allow the law to take its own course, in its place or prescribe specifically, that the personal law of the life assured will govern the distribution of payment, of the insurance policy amount.* In the absence of any such provision, there is no escape from reading and interpreting section 39, as it stands and making over the amount to the nominee. There is neither law nor equity, nor good conscience, to deprive the nominee, of his legitimate

rights and unjustly enrich a person, whom the life assured, never intended to benefit.

It will be an inroad into the legislative power and content of the Parliament, for the Judiciary to attempt to find non-existent things in the statute. Section 39, as it stands, has to be treated as a special provision of law, equating the nomination, to the nearness of a will, or testament, declared solemnly by the life assured, as to the disposal of the policy amount. The absence of the terms, "Right", "Title", or "Interest", in section 39, in regard to the amount, directed to be paid, to the nominee, does not militate, in the least, against the nominee getting the policy amount absolutely to himself.

It is a well-known dictum, that it would be the primary duty of the Courts, to advance the avowed intention of Parliament and not to scuttle the same, by adhering to their own concepts, which do not fit in, in the context. To whittle down the nominee, to an accountable fiduciary agent, with no beneficial interest in the amount, under the policy, is not the object and intention of the law-makers nor that of the policy-holder.

Even assuming, without conceding, that there is lacunae in section 39, for which there is not the slightest warrant, as discussed by me above, the Courts would be justified in the background of the clear intention known, expressed and gathered from section 39, to resolve the same, in favour of the nominee's absolute title and right to the policy amount, instead of resorting to the doctrine of trusteeship and collection agent.

Maxwell and Craig in their book on 'Interpretation of Statutes', lay down, the following doctrine:—

"Where the main object and intention of a statute are clear, it must not be reduced to a nullity, by the draftman's unskilfulness or ignorance of law. Even sections and sentences omitted to be incorporated, can be supplied by the Court, if the intention of the legislative body is clear" *Ramasamy Pillai* v. *Muthusamy Pillai.*[1]

Coming now, to the case-law on the matter as far as I am aware, there is no Supreme Court ruling on this subject. The decisions of the High Court are not uniform in this regard.

The decision reported in *Atmaram Mohanlal* v. *Gunvantiben*[2] has fallen back on the theory of trusteeship and collection agent for the nominee. *Kesari Devi* v. *Dharma Devi*[3] does not favour the theory of, nominee being a trustee or collection agent. It gives sound and cogent reasons, not to follow the abovesaid theory and holds that the nominee has an absolute heritable right to the amount. *L.I.C.* v. *United Bank of India Ltd.*,[4] concedes, that if the nominee lives on the date of the death of the policy-holder, he can validly lay claim, to the payment of money for himself, personally and abolutely, though its observations, in certain other respects, lean in favour of the doctrine of agency, and trusteeship, for the nominee. *Raja Ram* v. *Mata Prasad*[5] was not a case between the nominee and the heirs of the deceased life assured. It related to the right of the creditor of the deceased life assured to proceed against the policy amount in the hands of the nominee. They leave open specifically the question, decided in *Kesari Devi's case*[3] regarding the nominee's title to the amount, stating that the same did not arise before them.

1. (1953) 1 M.L.J. S.N. p. 41.
2. (1977) 18 Guj. L.R. 668: (1977) A.C.J. 449: A.I.R. 1977 Guj. 134.
3. A.I.R. 1962 All. 355.
4. A.I.R. 1970 Cal. 513 at 518.
5. A.I.R. 1972 All. 167 (F.B.).

In *Karuppa Gounder* v. *Palaniammal*[6] the tie was between the wife (the 1st plaintiff) the nominee of the life assured, the daughter (2nd plaintiff) of the deceased life assured and mother-in-law (5th defendant) of the life assured. The learned Judges held that the 1st plaintiff being the nominee, she alone was entitled to the insurance amount. This ruling as one of a later Division Bench decision must prevail as against the earlier Division Bench ruling in *D.M. Mudaliar* v. *I.O. and B. Corporation*[7] *Smt. Saraswathi Bai* v. *Smt. Malati.*[8] and *Sarojini Amma* v. *Neelakanta Pillai*[9] have made the position of the nominee a truncated one, making him a trustee and an agent for collection, on the basis of certain English decisions and concepts, which can have no relevance, for us at all, for all the reasons I had set out above.

The matter is a simple one, based on the interpretation of a simple section 39. To attract the farfetched theory of trusteeship and agency, for nomination under section 39, is only doing violence to the clear language of the said section. It is regrettable, that all the above reasoning and arguments placed and advanced *supra*, in this discussion, had not been put forth before some of the Judges and there had not been a proper canvassing of the position in all its aspects.

The refusal on the part of the Gujarat High Court, in *Atmaram Mohanlal's case*[10] to send up that case to the Supreme Court, by issue of the Certificate sought for, on the ground that the case did not involve any substantial question of public importance, is unfortunate.

The characterisation of the decision reported in *Kesari Devi's case*[11] as an *ipsi dixit* of the Judges rendering it, by the Gujarat High Court, in *Atmaram Mohanlal's case*[12] referrred to above is not fair to the sound and robust wisdom displayed in that ruling.

A fresh look, a rethinking and analysis of the subject on the part of the Judiciary, is required, at an early date. To state, that a vital matter concerning millions of policy-holders of the monolithic giant organisation of Life Insurance Corporation of India, does not involve any substantial question of public importance, is not easily understandable and does little justice, to the all-embracing question, that arises and concerns a mighty substantial section of the Indian population.

An authoritative pronouncement, by the Supreme Court, on the subject dealt with, and pin pointed above, *viz., the rights of nominee under section 39 of the Act, which is a day-to-day question, engaging the top men of the Life Insurance Corporation authorities, settling innumerable contested claims, between the nominee* and the heirs of the life assured, is *eagerly awaited.*

If any difficulty or uneasiness should still be felt on the part of some of the Courts, to deviate from their trodden path, it is for Parliament to step in and make the law, *so as to reflect the wishes and intentions of the policy-holder and do justice to him.*

---

6. (1963) 1 M.L.J 86: 76 L.W. 236: I.L.R (1963) Mad. 434:A.I R. 1963 Mad. 245.
7. (1956) 2 M.L.J. 476: I.L.R. (1957) Mad. 326: A.I.R. 1957 Mad. 115.
8. A.I.R. 1978 Karn. 8.
9. A.I.R. 1961 Ker. 126.
10. 1977 A.C.J. 449; A.I.R. 1977 Guj. 134.
11. A.I.R. 1962 All. 355.
12. 1977 A.C.J. 449: A.I.R. 1977 Guj. 134,

STARTING POINT OF LIMITATION FOR A SUIT TO REDEEM AN OTTI, WHERE THERE IS A PURAKADAM.

By

R. BALAKRISHNAN, *Advocate, Nagercoil.*

Purakadam is a further advance made by a mortgagee on the security of the land already mortgaged to him. The words "puravaippu or purakadam" imply that the amount due under the deed of further charge is payable with the original mortgage amount, in other words, the effect of the transaction is to increase the principal of the original mortgage by the amount subsequently advanced—*vide* Sundara Aiyar's Malabar and Aliya Santhana Law, 1922 Edition, page 456.

When there is a purakadam the cause of action for filing a suit for redemption is the date of the purakadam as per the Travancore Limitation Act 1100 M. E., (Act VI of 1100 M. E.) Section 20 (1) of the said Act reads thus:—

"If before the expiration of the period prescribed for redemption of a mortgage, the mortgagee accepts from the mortgagor a puravaippu or purakadam deed creating a further charge on the mortgaged property, and duly registered, the prescribed period of limitation shall be computed from the date of such puravaippu or purakadam deed." A provision similar to section 20 (1) of the Travancore Limitation Act, 1100 M.E., is not found in the Indian Limitation Act 1908. The Travancore Limitation Act 1100 M.E., was repealed, and the Indian Limitation Act was extended to the erstwhile Travancore-Cochin State with effect from 1st April, 1951, by virtue of section 6 of the Part B State Laws Act III of 1951.

What is the effect of the repeal on a purakadam executed before the Indian Limitation Act was extended to the erstwhile Travancore State? The area now comprised in Kanyakumari District and Shencotta Taluk of Tirunelveli district of Tamil Nadu was part of the erstwhile Travancore-Cochin State. This area is called transferred territory.

In *Thomas* v. *Victor*[1] Mr. Justice Mohan held that the mortgagor ought to consolidate both the mortgages and redeem both, and piecemeal redemption is impossible. He further held that his right of consolidation is not a mere right to have the advantage of an existing statute, but it is a vested right in the property. He accepted the view that the period of limitation has to be reckoned from the date of the purakadam. Justice Mohan laid emphasis on a provision in the purakadam deed also. It is submitted that the position would not be different even if there is no such provision in the purakadam deed. It is an implied term in a purakadam deed that the mortgagee shall be in possession of the mortgaged property in accordance with the purakadam deed also.

Mr. Justice Varadarajan in *Parameswaran Thampi* v. *Kanakamma Thankachi, and others*[2] has however held that a purakadam cannot be taken as a starting point for limitation for a suit for redemption after the Indian Limitation Act, 1908, was extended to the transferred territory. Mr. Justice Varadarajan has not considered the prior ruling by Justice Mohan. Mr. Justice Varadarajan came to the conclusion that after the Transfer of Property (Amendment) Act, 1929, the doctrine of consolidation cannot be applied at all, and that the Amendment Act did away with the doctrine of consolidation. It is submitted that the decision

1. (1976) 2 M.L.J. 5: 89 L.W. 164: A.I.R. 1976 Mad. 273.
2. (1977) 90 L.W. 258.

of Justice Varadarajan is debatable. In the transferred territory the Transfer of Property Act was not in force till 1st May, 1952. The general principles of the Transfer of Property Act, 1882, were however being applied in the transferred territory which formed part of erstwhile Travancore-Cochin State.

The doctrine of consolidation contained in section 61 of the Transfer of Property Act, 1882, as it stood before the Transfer of Property (Amendment) Act, 1929 was recognised as the law in the transferred territory prior to 1st May, 1952,—vide *P. Neelakantan* v. *Ummini Pillai*[3] *Bhaskaran* v. *Agnisarmara*[4] *Azheekkal Sree Varatha Devaswom* v. *Ummen Sait Abdulla Sait.*[5] The Travancore and Travancore-Cochin Courts followed the dictum laid down in *Ramarayaningar* v. *Govinda Krishna,*[6] *Janki Nath* v. *Pramatha Nath,*[7] *Nachappa Goundan* v. *Samiappa Goundan.*[8] So, the law that is applicable in the transferred territory is the law as it stood prior to the Transfer of Property (Amendment) Act, 1929, for transactions which took place prior to 1st May, 1952. The right of consolidation is a vested right in the transferred territory, which cannot be taken away by the subsequent extension of the Transfer of Property Act to the transferred territory. When a purakadam deed was executed prior to 1951, in the transferred territory, the Travancore law is applicable, and not the Transfer of Property Act. In *M.S. Padmanabha Iyer* v. *Devadas Silus*[9] and another, Justice P.R. Gokulakrishnan held that for a transaction effected in the transferred territory prior to the Transfer of Property Act being made applicable to the transferred area, *i.e.*, 1st May, 1952, the Travancore law should be made applicable. In such circumstances if a purakadam was executed prior to 1st April, 1951; when the Indian Limitation Act was made applicable to the transferred territory, the law applicable is the Travancore law; the mortgagor could file a suit for redemption within the prescribed period from the date of the purakadam, which is to be taken as the starting point for limitation.

Apart from the above discussion, it is submitted that Mr. Justice Varadarajan's view is not correct for the following reasons:—In a suit for redemption by the mortgagor the date of purakadam is to be taken as the starting point of limitation. It is a vested right under section 20, of the Travancore Limitation Act. The extension of the Indian Limitation Act of 1908 to the transferred territory will not take away the already vested right of the mortgagor. It is held in *Subodhchandra* v. *Kanhai Lal*[10], as follows:—

"Even though the new Limitation Act of 1963, was retrospective in operation, it was not so far retrospective as to be confiscatory in nature even in respect of the existing rights of the parties. The decree which was alive by reason of the extension of the period effected by acknowledgment, and part payment under sections 19 and 20 of the old Limitation Act did not lose the extended life because of the fact that no such extension was available under the new Act of 1963". When section 20 of the Travancore Limitation Act

3. (1952) K.L.T. 129: 7 D.L.R. (T.C.) 479: A.I.R. 1952 T.C. 295.

4. (1946) T.L.R. 546.

5. (1950) K.L.T. 462: (1950) 5 D.L.R. (T.C.) 473: A.I.R. 1951 T.C. 17.

6. (1927) I.L.R. 50 Mad. 180: 52 M.L.J. 338: 25 L.W. 621: 54 I.A. 68: A.I.R. 1927 P.C. 32.

7. (1940) 1 M.L.J. 446: 51 L.W. 116: 67 I.A. 82: A.I.R. 1940 P.C. 38.

8. (1946) 2 M.L.J. 35: A.I.R. 1947 Mad. 18.

9. (1970) 2 M.L.J. 520.

10. A.I.R. 1968 Cal. 280.

specifically provides, that the prescribed period of limitation shall be computed from the date of purakadam for a redemption suit filed by the mortgagor, even though the Indian Limitation Act, 1908, has no such provision as in the Travancore Limitation Act of 1100 M.E. the already vested right of the mortgagor under section 20 of the Travancore Limitation Act cannot be taken away by the introduction of the Indian Limitation Act in the transferred territory, and by the repealing of the Travancore Act.

Further, clauses (*a*) and (*b*) of the proviso to section 6 of the Part B States Act (III of 1951) specifically save the existing rights derived by the parties under the Travancore Limitation Act, and the general principles of the Transfer of Property Act, Section 6 of the Part B States Laws Act, 1951, reads thus:—

"*Repeals and savings*:—If immediately before the appointed day, there is in force in any Part B State any law corresponding to any of the Acts or Ordinances, now extended to that State, that law shall, save as otherwise expressly provided in (this Act), stand repealed:

Provided that repeal shall not affect:—

(*a*) the previous operation of any law so repealed or anything duly done or suffered thereunder, or

(*b*) any right, privilege, obligation or liability acquired accrued or incurred under any law so repealed, or

(*c*) any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed, or

(*d*) any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceedings or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if this Act had not been passed.

Provided further that, subject to the preceding proviso (any appointment, or deligation made notification, order, instruction or direction issued, rule, regulation, form, byelaw or scheme framed, certificate obtained, patent, permit or licence granted or registration affected) under any such law shall be deemed to have been done or taken under the corresponding provision of the Act or Ordinance as now extended to that State, and shall continue to be in force accordingly unless and until superseded by anything done or any action taken under the said Act or Ordinance."

The proviso to section 6 is explicit that any rights accrued under the repealed Act are saved. Hence in filing a suit for redemption the mortgagor can avail of the benefit of Section 20 of the Travancore Limitation Act, and hence the prescribed period of limitation shall be computed from the date of purakadam and not from the date of the original mortgage.

Hence I submit that the conclusion arrived at by Mr. Justice Mohan is correct, and Mr. Justice Varadarajan's view requires reconsideration.

SECTION 25 (*d*) OF THE TAMIL NADU COURT-FEES AND SUITS VALUATION ACT (XIV OF 1955).

By

S. GOVINDARAJAN, B.SC., B.L., *Advocate and Government Pleader, Chidambaram.*

If you want a declaration that you are not liable to pay Sales tax, Income-tax, Municipal tax or any other amount and the consequential relief of injunction, or a declaration of your rights as a trustee or any other position or a right of easement and the consequential relief of injunction, have recourse to section 25 (*d*) of the Tamil Nadu Court-fees Act and value the plaint on Rs. 400. This appears to be the *modus operandi.*

Section 25 (*d*) reads thus: "In other cases, whether the subject-matter of the suit is capable of valuation or not, fee shall be computed on the amount at which relief sought is valued in the plaint or on rupees four hundred whichever is higher".

Prior to the enactment of the Madras Court-fees and Suits Valuation Act (XIV of 1955) the valuation was according to section 7-IV (*c*) of the Court-fees Act (Central Act XVII of 1870).

Section 7-IV (c) *runs as follows*:

"7-IV (*c*)—for a declaratory decree and consequential relief—to obtain a declaratory decree or order where consequential relief is prayed,

..........in all such suits, the plaintiff shall state the amount at which he values the relief".

It will be very clear from a reading of section 25 (*d*) of the Tamil Nadu Act that it relates to intangible or incorporeal rights. That is how it has been judicially interpreted. Vide *Dr. Arthur Nathaniel* v. *R. P. Nathaniel*[1], *K. Sundaramurthy* v. *Manickammal*[2] and *Abdul Rahim Saheb* v. *The Madras State Wakf Board*[3].

So long as the relief relates to a right of easement or a right relating to an office or management there is no difficulty. The plaintiff has the right to put his own valuation or value it on the higher valuation of Rs. 400.

The difficulty comes in only when the plaintiff wants a declaration and injunction in respect of his non-liability to pay some tax or other monetary liability. In such cases can a plaintiff put his own valuation or value it on Rs. 400? In my humble opinion, he cannot.

In a very early case reported in *Rachappa Subrao* v. *Shidappa*[4], the Privy Council has laid down the dictum: "The object of the Act is not to arm a litigant with a weapon of technicality but to secure revenue to the State and its provisions are to be so construed". This decision has stood the test of time and has been followed in later decisions.

In a suit when the plaintiff in effect wants to escape a monetary liability, the value of the relief will be the amount which the plaintiff wants to disown liability for. In whatever manner the plaint allegations are camouflaged the substantive relief is the escape from liability from payment of this particular amount.

"In order to determine the amount of Court-fee payable in a suit, the Court has to see in each particular case, what the nature of the relief claimed is and for that purpose it must look at the allegations contained in the plaint. The substance and not the mere language of the plaint must be looked into". Vide *Arunachalam Chetty* v. *Rangaswami Pillai*[5]; *Venkatasiva* v. *Venkatanarasimha*[6]; *Kayathan Roche* alias *G. C. Roche* v. *K. Chinnayya Roche*[7]; *Gutta Venkayya* v. *Venkata Ratamma*[8]; *K. Gopalan* v. *A. Venkatesan*[9]. If this test

1. (1962) 2 M.L.J. 420.
2. (1964) 1 M.L.J. 152.
3. (1965) 1 M.L.J. 278.

4. (1919) 36 M.L.J. 437 : 46 I.A. 24 : A.I.R. 1918 P.C. 188 (P.C.).
5. I.L.R. 38 Mad. 922 : (1915) 28 M.L.J. 118.
6. (1932) 63 M.L.J. 764 : A.I.R. 1932 Mad. 605.
7. (1939) 1 M.L.J. 425: A.I.R. 1939 Mad. 435.
8. (1937) 2 M.L.J. 916 : A.I.R. 1938 Mad. 253.
9. (1953) 1 M.L.J. 147 : A.I.R. 1953 Mad. 573.

is applied there can be no doubt that the plaint will have to be valued on the amount which he seeks to disown liability for.

In *Natharam Kashiram* v. *State of Madhya Pradesh*[10], the plaintiff disputed his liability to pay some amounts due to Government for which recovery proceedings had been instituted by the Government. The Court held that "the plaintiff is challenging his liability for a certain amount and if he were to do so it would mean that he is avoiding liability to that extent necessarily requiring an adjudication whether that amount is or is not due. Therefore this is not a case where the claim is incapable of any valuation or liable to be arbitrarily valued. The claim in such a suit being capable of definite valuation it cannot be urged that to the plaintiff it has a different value which he can put down in the plaint either for purposes of Court-fees or for purposes of jurisdiction. When he seeks to avoid the liability for a definite amount, value to him must be the same which he seeks to avoid".

Similarly in a recent Andhra decision (reported in *Andhra Pradesh State Electricity Board* v. *K. Ramachandra Reddy*[11]) in deciding a similar question arising under section 24 (*d*) of the Andhra Court-fees Act which is almost in *pari materia* with section 25 (*d*) of the Tamil Nadu Act, the Court held—"The test to be adopted by the Court in valuing the relief under secion 24 (*d*) is to find out the advantage which is sought to be gained by the plaintiff or the loss sought to be avoided. Essentially the question of Court-fee has to be considered only on the allegations made in the plaint".

It will be very clear from the decisions referred to above that the plaint allegations—the substance of the allegations have to be looked into for ascertaining the Court-fee. The Court-fee payable can only be on the amount for which the plaintiff seeks to avoid liability. That is the main criterion. The plaintiff has no right arbitrarily to put a notional value or value the relief at the higher value of Rs. 400.

This is what I consider to be the correct position as evolved by judicial decisions. If there is any difficulty or doubt regarding such a construction or interpretation, it is for the Legislature to make the position more clear by way of an amendment.

---

10. A.I.R. 1962 M.P. 367.
11. (1977) 2 An.W.R. 366 : (1977) An.L.T. 101 : (1977) 1 A.P.L.J. 154 : A.I.R. 1977 A.P. 200.

JUSTICE RAMAPRASADA RAO'S APPOINTMENT AS CHIEF JUSTICE.

It is highly gratifying that Justice Ramaprasada Rao has been appointed Chief Justice of our High Court with effect from 29th May, 1978. The members of the Bar had felt, in fact, that the appointment should have been made even earlier. With nearly twelve years of service as a puisne Judge—he was made an Additional Judge of the High Court on 7th December, 1966—and his earlier experience as a member of the Bar since 1939, Justice Ramaprasada Rao has all the qualities needed to make a successful Chief Justice. As a Judge he has won a good reputation showing in his work a happy combination of innate talent, temperament, erudition and a perennial interest in the intricacies of law. He has also evinced the other qualities indispensable to a Judge, great judicial patience and an innate sense of fairness and justice. He is quite conversant with the different branches of law and has been fairly at home whatever the point raised before him whether one of Contract or Hindu law or Constitutional law or Labour and Tenancy law or Procedural law. He has been responsible for a number of learned judgments which have been appreciated by the members of the Bar as thorough and stimulating thought. It would be useful to remember in this connection what Lord Bowen said apropos of English Judges long ago: "There is no human being whose smile or frown, there is no Government, Tory or Liberal, whose favour or disfavour would start the pulse of an English Judge upon the Bench or move by one hair-breadth the even equipoise of the scales of justice".

Justice Ramaprasada Rao is a pious and religious man, a lover of the fine arts and a champion of humanitarian causes. In his new task he carries the goodwill and co-operation of the members of the Bar. His tenure of office as Chief Justice will be relatively short extending up to 6th November, 1979. We convey our hearty felicitations to the new Chief Justice.

NOTE ON "S. PALANIVELU v. VERADAMMAL", (1978) 1 M.L.J. 212: A.I.R. 1977 Mad. 342.

By

S. GOVINDARAJAN, B.SC., B.L., *Advocate and Government Pleader, Chidambaram.*

A somewhat disturbing decision has been handed down to us by Justice Varadarajan in the decision reported in *S. Palanivelu* v. *K. Veradammal*[1].

The facts of the case are as follows: The respondent filed a suit for declaration of title to the suit property and recovery of possession of the portion *D, E, F, G,* in the south-western corner and for a permanent injunction to restrain the appellant from interfering with her possession of the other portions of the suit property. She claimed title on the basis of a settlement deed of 11th June, 1962 executed by her mother in her favour. The trespass into the portion *D, E, F, G,* was said to be on 21st April, 1968. The appellant was the owner of the property to the west of the suit property, having been allotted to him by the Co-operative Housing Society. The appellant denied title and possession of the respondent. Both the lower and lower appellate Courts granted a decree as prayed for.

One fact which appears to have influenced the learned Judge was that the appellant had put up a portion of his main building and had sunk a well in the trespassed portion. Both the lower and lower appellate Courts have found that the appellant is a trespasser and has encroached upon the respondent's property and have granted a decree for declaration of title and for vacant possession after removal of superstructure.

Varadarajan, J., while concurring with the findings of the Courts below on the question of title and on the question of trespass, finds that the plaintiff will not be entitled to recovery of possession based on the doctrine of equitable estoppel amounting to acquiescence and that she will be entitled to only compensation as per section 51 of the Transfer of Property Act. He observed: "In the present case also, as already stated, the respondent has not done anything when the appellant was putting up a portion of his main building on a portion of the trespassed property and sinking a major portion of the well and doing other acts on the trespassed property. The appellant could not have done these things in a hurry. They must have taken several months for the appellant to complete the things which he had done on the property. The respondent had not disclosed these things in the plaint and has not prayed for mandatory injunction for the removal of superstructures put up by the appellant on the trespassed portion of the suit property. The Court would therefore be justified in inferring acquiescence on the part of the respondent. I consider that this is not a case for directing delivery of possession of the trespassed portion to the respondent. But this is a case where the respondent has to be compensated in money for the value of the trespassed portion".

I respectfully submit that this is a wrong approach and runs counter to several decisions of our High Court and other Courts and the Supreme Court.

On a question of fact also the learned Judge has not appreciated the notice and the reply that passed between the parties, when the respondent complained of encroachment in a small portion and the appellant denied it and asked the respondent to refer to the Housing Society. Another important factor which the learned Judge refused to consider was the absence of pleadings on the question of equitable estoppel. The decision reported in *Fakiruddin Saheb* v. *Ramaswamy Mudaliar*[2], wherein it has been held that no relief on the basis of equitable estoppel could be granted with-

1. (1978) 1 M.L.J. 212: A.I.R. 1977 Mad. 342.

2. (1965) 1 M.L.J. 167.

out pleadings appears to have been brought to his Lordship's notice. But he says that inasmuch as the respondent has not referred to the constructions by the appellant on the trespassed portions in the plaint, it is not open to the respondent to contend that the question of equity should not be considered on the ground that no plea in that regard has been raised in the written statement.

Estoppel is a rule of evidence and has to be specifically pleaded and proved. So whether there are any allegations in the plaint about the constructions or not it is incumbent upon the defendant who wants relief on equitable considerations to specifically plead and prove the estoppel. The view of his Lordship overlooks this. The Supreme Court in *S. Madanappa* v. *Chandramma*[3], has held ...... "In some decisions of the High Court's reference has been made to 'equitable estoppel', but we doubt whether the Court while determining whether the conduct of a particular party amounts to an estoppel could travel beyond the provisions of section 115 of the Evidence Act". The learned Judge states that the respondent has not asked for the relief of mandatory injunction for the removal of the constructions. When there is a prayer for the relief of recovery of vacant possession the prayer for the relief of mandatory injunction seems to be redundant and superfluous.

The law on this question has been elaborately discussed by Justice M. M. Ismail in *Bodi Reddi* v. *Appu Goundar*[4]. With his characteristic thoroughness and lucidity, his Lordship has exhaustively discussed the question on various aspects with reference to various decisions and finally observes: "thus both on principle and on authority it is clear, that when the owner of a land files a suit for recovery of possession of this land from a trespasser, who had built upon the land with incidental prayer for a mandatory injunction directing the defendant to demolish the building put up by him the plaintiff (owner) is entitled to succeed once he has established his title and the fact that he has been in possession of the property within 12 years from the date of suit...... In this view *viz.*, that when the suit itself is for recovery of possession, the question of acquiescence, or delay or laches on the part of the plaintiff cannot arise...... In a very early case, *Rama Rao* v. *Raja Rao*[5], referred to in *Premjet Jivan Bhate* v. *Haji Cassum Juma Ahmed*[6], this Court held that the equitable doctrine of laches and acquiescence does not apply to suits for which a period of limitation is provided by the Limitation Act. Therefore once the suit is within time the doctrine of laches or acquiescence has no place to defeat the right of the plaintiff to obtain relief in the suit". In *N. C. Subbayya* v. *Pattan Abdulla Khan*[7]. Justice Viswanatha Shastri says: "To say the buildings erected in such circumstances should not be directed to be removed and only damages could be awarded would, in my opinion, be in effect to sanction a condemnation of the plaintiff's property and an appropriation of it for the defendant's use...... To say that a small strip of building site could thus be appropriated by a trespasser would be to admit a rule of law which can be applied limitlessly". It is needless to refer to various other decisions as the decision of Justice Ismail is a comprehensive one.

Section 51 of the Transfer of Property Act cannot be applied to the case of a 'trespasser' as has been repeatedly stated by our High Court and in this case this appellant has been found to be a trespasser by all the three Courts.

It is neither just nor fair to say that a man will lose his right to recover possession of property before the time limited therefor by the Limitation Act simply on the basis of a rule of evidence which is not even pleaded.

For the foregoing reasons I respectfully submit that this decision requires reconsideration.

---

3. (1966) 2 S.C.J. 310: (1965) 8 S.C.R. 283: A.I.R. 1965 S.C. 1812.
4. (1970) 2 M.L.J. 577.
5. (1864) 2 Mad. H.C.R. 114.
6. (1996) I.L.R. 20 Bom. 28.
7. (1956) 69 L.W. (Andh.) 52.

A NOTE ON V. K. KARUPPIAH AND OTHERS *v.* THIRUVANNAMALAI ADHEENAM, I. L. R. (1978) 1 Mad. 343: 90 L.W. 662.

By

S. GOVINDARAJAN, B.SC., B.L., *Advocate and Government Pleader, Chidambaram.*

The respondent Adheenam was granted ryotwari patta in respect of the suit lands on the basis of his claim for both melwaram and kudiwaram rights over the suit properties which were inam properties taken over by the Government on the abolition of Inam Estates. The question of title to the suit properties was left open to be decided by the civil Court. The Adheenam then filed a suit for declaration of title and injunction or in the alternative for possession alleging that the appellants were lessees for a couple of years, and they were not in possession and they cannot claim cultivating tenancy rights as they had denied the title of the landlord. The suit was dismissed by the trial Court and the decision was confirmed by the lower appellate Court. The High Court remanded the matter to the lower appellate Court. After remand the lower appellate Court found that the respondent had title and that the appellants cannot claim tenancy rights as they had denied the title of the landlord and decreed the suit. Against the decision the appellants preferred this appeal to the High Court. V. Ramaswami, J., held that the respondent had title, but disallowed the claim for possession on the ground that the civil Court had no jurisdiction to grant the relief of possession as the appellants were cultivating tenants entitled to the benefits of the Madras Cultivating Tenants Protection Act. It was observed: "In fact the question whether there is wilful denial or not will have to be gone into by the Revenue Court and this Court is not entitled to go into that question........ I am therefore of the opinion that the only question that could be gone into by a civil Court in a suit between the landlord and tenant is whether there is a tenancy agreement express or implied between the landlord and the tenant and whether the defendant is a cultivating tenant within the meaning of the Cultivating Tenants Protection Act.......Once the civil Court finds that the defendant is a cultivating tenant within the meaning of the Cultivating Tenants Protection Act it could not order eviction of the tenant and either the suit will have to be dismissed on the ground of want of jurisdiction so far as the claim for possession is concerned or the plaint will have to be returned for representation in proper Court".

This decision runs counter to the decision of the Supreme Court in *Chinnamuthu Gounder* v. *Perumal Chettiar*[1]. Even on facts the learned Judge has not noticed some important factors: (1) The appellants denied not only the title but also the tenancy itself. (2) For faslis 1369 and 1370 the lands were leased in public auction to plaintiffs 2 to 4 who had taken possession and whatever tenancy rights the appellants can claim had become extinguished and barred inasmuch as they had not asked for restoration of possession under section 4 of the Act within the period limited therefor, vide *P. Subbiah Mudaliar and others* v. *Pakkiri Pandaram*[2]. Once the period prescribed under the Act expires the landlord gets a vested right against any claim of the tenant for restoration to possession. So even on facts it will be found that the appellants did not and could not claim any tenancy rights.

In *Chinnamuthu Gounder* v. *Perumal Chettiar*[1], the Supreme Court held: "The clear import of section 6-A is that in any suit for possession if the defendant proves not only that he is a cultivating tenant but also that he is entitled to the benefits of the Act, the civil Court is bound to transfer it to the Revenue Divisional Officer and cannot

1. (1970) 2 M.L.J.(S.C.) 114: (1970) 2 S.C J. 626 : (1970) 2 An.W.R.(S.C.) 114 : (1970) 3 S.C.R. 704: A.I.R. 1970 S.C. 1197.
2. (1958) L.W. 698: (1958) 2 M.L.J. 510.

proceed to try and dispose it of itself. In the present case it has been found by the High Court as also by the trial Court that the appellants had wilfully denied the title of the respondent who is the landlord. *They thus became disentitled to the benefits under the Act. Consequently the civil Court had jurisdiction to proceed with the trial and there was no question of the transferring the suit to the Revenue Divisional Officer.* There has been a consistent course of decisions of the Madras High Court that in order to attract the applicability of section 6-A both the conditions must co-exist, *viz.*, the defendant must be a cultivating tenant within the meaning of the Act and he should be entitled to the benefits of the Act........The appellants have been clearly found to have wilfully denied the title of the landlord. That disentitled them to the benefits of the Act by virtue of the provision contained in section 3 (2) (*d*). *The trial of the suit was thus competent in the civil Court which had complete jurisdiction to dispose of the same*". Through this decision was cited the learned Judge has not distinguished the same.

In *V. Kuppusamy and others* v. *Sri Subramaniaswamy Devasthanam*[3], referred to by the Supreme Court in *Chinnamuthu Gounder* v. *Perumal Chettiar*[4], Justice Balakrishna Iyer has held that: "Having regard to the scheme of the Act and the language of the section, before a civil Court can transfer a proceeding under section 6-A of the Act it must be satisfied that the tenant is not only a cultivating tenant as defined by the Act, he should also be entitled to some benefit or other under the Act."

In *Aravan Servai* v. *Kanugan Servai*[5], P. N. Ramaswami, J., has held that: "The jurisdiction of the Revenue Divisional Officer is dependent upon two factors, *viz.*, that the relationship of landlord and cultivating tenant must exist between the parties coming before him and it must be for one of those reliefs specified in the Act". In *Ammasi Gounder* v. *Ravala Gounder*[6], Justice M. M. Ismail decides: "The protection against eviction which a tenant has under the provisions of the Madras Cultivating Tenants' Protection Act is only against the landlord and not against any other person. Therefore if the defendant in a suit for ejectment pleads that the plaintiff in the suit is not his landlord there is no scope for the defendant contending that he is entitled to any protection under the provisions of the Act. *The very basis of the protection conferred by the Act is the existence and the acknowledgment of the relationship of landlord and tenant between the parties.* Before a civil Court can transfer the matter to the Revenue Divisional Officer under section 6-A of the Madras Cultivating Tenants' Protection Act three conditions must be fulfilled. First, the defendant must be a cultivating tenant; secondly, he must be entitled to the benefits of the Act; and thirdly, he must on transfer of the proceedings from the civil Court to the Revenue Divisional Officer be in a position to obtain one or the other of the statutory reliefs provided in his favour under the Act. The jurisdiction of the civil Court to transfer a suit to the Revenue Divisional Officer is dependent on its finding on these three conditions and *if any one of these conditions is not fulfilled the civil Court does not lose its jurisdiction* and it cannot transfer the suit to the Revenue Divisional Officer". Nothing can be more explicit and clear than this lucid exposition of law. As Justice Ismail points out, for the defendant to claim benefits under the Act and for the Court to find that he is entitled to the benefits of the Act, there must be an admitted pre-existing relationship of landlord and tenant. In the case in question the appellants not only deny the title of the landlord but also the tenancy

3. (1958) L.W 303: (1958) 1 M.L.J. 208.
4. (1970) 2 S.C.J. 616 : (1970) 2 M.L.J. (S.C.) 114.
5. (1958) L.W. 532 : (1958) 2 M.L.J. 505.
6. (1968) 2 M.L.J. 90.

itself. So they cannot claim and they do not in fact claim any benefits under the Act and the civil Court's jurisdiction is not ousted.

For the foregoing reasons it is respectfully submitted that the decision requires reconsideration.